Office Supreme Court, U.S.
FILED
APR 19 1985
ALEXANDER L. STEVAS
CLERK

84-1659

No. _____

In The
Supreme Court Of The United States

OCTOBER TERM, 1984

STATE OF CONNECTICUT
Petitioner

v.

ALAN H. MARTIN
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CONNECTICUT

JOHN M. MASSAMENO
Assistant State's Attorney

Division of Criminal Justice
Office of the Chief State's Attorney
340 Quinnipiac Street
Wallingford, Connecticut 06492
(203) 265-2373

5 pp

QUESTIONS PRESENTED

1. Whether a state court may use a procedural default rule to enlarge the scope of the Fourth Amendment?

2. Whether the Appellate Court erred in refusing to apply to the facts of this case the good-faith exception to the exclusionary rule, enunciated while this case was pending decision on direct review?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED . . . 1

STATEMENT 2

REASONS FOR GRANTING THE WRIT 9

CONCLUSION 25

TABLE OF AUTHORITIES

Cases: **Page**

Camp v. Arkansas, 404 U.S. 69, (per curiam), rev'd and remanded, 249 Ark. 1075, 467 S.W.2d 707 (1971) 15

Delaware v. Prouse, 440 U.S. 648 (1979) 18

Henry v. Mississippi, 379 U.S. 443 (1965) 15, 16

Illinois v. Gates, __ U.S. __, 103 S. Ct.2317 (1983) 22

Massachusetts v. Upton, __ U.S. __, 104 S. Ct. 2085 (1984) 22

Michigan v. Tyler, 436 U.S. 449 (1978) 15

New York v. Quarles, __ U.S. __, 104 S. Ct. 2626 (1984) 12

North Carolina v. Butler, 441 U.S. 369 (1979) 18

Oregon v. Hass, 420 U.S. 714 (1975) . .18

Scott v. United States, 436 U.S. 128 (1978) 12

Solem v. Stumes, __ U.S. __, 104 S. Ct. 1338 (1984) 20, 21

State v. Burke, 182 Conn. 330, 438 A.2d 93 (1980) 14

State v. Martin, 195 Conn. 802, __ A.2d __ (1985) 1

Cases-Continued: **Page**

State v. Martin, 2 Conn. App. 605, 482 A.2d 70 (1984) . . . . . passim

Staub v. City of Baxley, 355 U.S. 313 (1958) 15

United States v. Cassity, __ U.S. __, 104 S. Ct. 3581 (1984) 22, 23

United States v. Crozier, __ U.S. __, 104 S. Ct. 3575 (1984) 23

United States v. Johnson, 457 U.S. 537 (1982) 19, 21

United States v. Leon, __ U.S. __, 104 S. Ct. 3405 (1984) . . . . . passim

United States v. Sager, 743 F.2d 1261 (8th Cir 1984) 20, 21, 24

United States v. Tate, __ U.S. __, 104 S. Ct. 3575 (1984) 23

Wainwright v. Sykes, 433 U.S. 72 (1976) 16, 17

Rules of Court:

Practice Book § 3063 14

Practice Book § 3165 14

Miscellaneous:

1 LaFave, Search & Seizure § 3.2(b) (1st ed. 1978) 12

OPINION BELOW

The opinion of the Connecticut Appellate Court (App. A, infra, 1a-12a) (original opinion), (App. B., infra, 13a-26a) (amended opinion) is reported at 2 Conn. App. 605, 482 A.2d 70 (1984). The decision of the Connecticut Supreme Court denying the State's Petition for Certification to Appeal is reported at 195 Conn. 802, __ A.2d __ (1985).

JURISDICTION

The decision of the Connecticut Supreme Court denying the State's Petition for Certification to Appeal was rendered on February 15, 1985, and notice was mailed to counsel on February 19, 1985.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides: "The Right of the people to be secure in their persons,

houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT

On August 26, 1981, the respondent was arrested and charged with illegal possession of a narcotic substance, in violation of Connecticut General Statutes § 19-481(a) (Rev. to 1981), and with illegal possession of a controlled substance, in violation of Connecticut General Statutes § 19-481(c) (Rev. to 1981). The respondent thereafter moved to suppress certain substances, which the State claimed were cocaine and methaqualone, that had been seized from his automobile at the time of his arrest. Following an evidentiary hearing, the trial court

granted the motion to suppress and dismissed the case, finding that the arrest that led to the seizure of the evidence was not supported by probable cause. App. A, infra, 2a. The Connecticut Appellate Court affirmed the trial court's decision, and the Connecticut Supreme Court denied the State's Petition for Certification to Appeal. App. A, infra.

1. The following facts were found by the trial court or are undisputed by the parties:

On the evening of August 26, 1981, Danbury police officers received an anonymous telephone call informing them that a blue Corvette with out-of-state license plates would be involved in a major cocaine transaction at the Foundry Cafe in about twenty minutes. Two officers left for the cafe shortly thereafter. Ten minutes after they arrived the officers observed a blue Corvette with New Hampshire license plates

enter an illuminated portion of the parking lot adjacent to the cafe. They observed the defendant and a blonde female passenger leave the vehicle and walk through the entrance to the cafe and the other stores located in the same building. App. A, infra, 4a.

Fifteen minutes later, the defendant left the cafe entrance accompanied by a male, who entered the Corvette with him. One of the officers identified the male accompanying the defendant as someone who frequented the cafe, which itself was associated with drug traffic, and who had been convicted of a drug charge eight years earlier. App. A, infra, 4a, 5a.

The defendant then drove the automobile to an unlit area of the lot. The officers, who believed that they then had probable cause to search the vehicle and intended to do so, boxed in the Corvette with two police vehicles. One of the

officers then approached the Corvette and asked the defendant for his driver's license and registration. The officer was unable to see inside the automobile while he stood next to it because its windows were darkly tinted. For his personal protection, the officer opened the driver's door of the vehicle, which activated the interior light and illuminated the passenger compartment. The officer then observed the defendant surreptitiously put a small amber bottle and a small spoon on the floor between his legs. Recognizing from his training that such items are used for carrying and snorting cocaine, the officer placed the defendant under arrest. Upon a search of the vehicle, the officers found a plastic bag containing what the State alleged to be approximately four ounces of cocaine and a paper bag containing $5,950.00. App. A, infra, 5a; T. at 27, 75; App. Ct. R. at 29.

2. The defendant was charged with possession of a narcotic substance and illegal possession of a controlled substance. Prior to trial, he filed a motion to suppress the evidence seized from the vehicle, which, having been granted by the trial court, resulted in a dismissal of the case and an appeal by the State to the Appellate Court.

3. In the Appellate Court's original opinion on appeal it concluded that: (1) the officers' avowed purpose in stopping the vehicle (i.e. to conduct a search) required that probable cause exist prior to the stop;[1] (2) probable cause to believe that the defendant was engaged in the commission

---

[1] More precisely, the court stated that, because the trial court had found that "the officers seized [the defendant] and his Corvette with the intention, not to investigate, but to search, and that the request for his license and registration was a pretext," the stop was "not an investigative stop" and, therefore, "must have been based on probable cause in order to be valid." App. A, infra, 8a (original opinion).

of a crime did not exist at the time the vehicle was stopped, rendering the subsequent search invalid under the Fourth Amendment; and (3) the good-faith exception to the exclusionary rule, first announced by this Court while this case was pending decision on appeal,[2] should not affect its decision in this case. App. A, infra, 2a (original opinion). Conn. App. 605, 605 n.2, 612, 616 (original opinion).

4. The State thereafter filed a motion to reargue, in which it claimed, in part, that (1) the Fourth Amendment standard for ascertaining the lawfulness of a search is an objective, and not a subjective one; (2) under that standard, there need have been only reasonable and articulable

---

[2] In United States v. Leon, ___ U.S. ___, 104 S. Ct. 3405 (1984) the Supreme Court decided that the exclusionary rule "should be modified so as not to bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause."

suspicion of criminal activity to justify the stop of the defendant's vehicle; and (3) the undisputed facts of the case satisfied that standard at the time the vehicle was stopped.

5. The Appellate Court granted the State's motion in part,[3] and amended its opinion by stating that, while the lawfulness of a search and seizure under the Fourth Amendment is "ordinarily" judged by an objective standard, in this case the State's failure to invoke such a standard before the trial court or, initially, on appeal would result in the court's adherence to its original position, that the stop of the vehicle could only be justified on a

---

[3] The Appellate Court granted the State's motion to reargue with respect to the following question: "Whether the stop of a vehicle otherwise lawful under the fourth amendment is rendered unlawful as a result of the state of mind of the officer who stopped the vehicle." Nevertheless, the court declined to hear reargument, ordering only rebriefing, and ultimately refused to consider, under an objective standard, whether the Fourth Amendment had been violated in this case.

showing of probable cause. App. B, infra, 21a (amended opinion). Interestingly, the court left undisturbed its conclusion that this was a "close case" on the question of probable cause, and that the officers "may well have [had] reasonable and articulable suspicion that the predicted drug sale was taking place." Id. at 616.

6. The Connecticut Supreme Court denied the State's Petition for Certification to Appeal. State v. Martin, 195 Conn. 802, __ A.2d __ (1985).

REASONS FOR GRANTING THE WRIT

The Appellate Court's conclusion that the State's alleged "procedural default" relieved the court of its obligation to apply the proper Fourth Amendment standard to this automobile search represents a radical departure from longstanding and well-established legal principles. This Court has often held that state courts are

not at liberty to enlarge the scope of any provision of the federal constitution. Yet the Appellate Court in this case has done just that. By holding that the State's failure to identify the "reasonable suspicion" standard for assessing the validity of the search prior to its Motion to Reargue relieved the court of its obligation to apply that standard, the Appellate Court has in effect enlarged the scope of the Fourth Amendment in Connecticut. Nor would the State's so-called "procedural default"[4] be an "adequate" independent state ground upon which the judgment below could rest. Surely, no procedural default rule can be used to excuse a court from applying

---

4 The State uses the term "procedural default" because the Appellate Court refused to apply the reasonable suspicion standard in this case on the ground that the State had not identified it before the trial court or in its brief to the Appellate Court. See App. B, infra, ___. The State does not believe, however, that a party's failure to identify controlling law is a "procedural default." Nevertheless, the State has used this term because it accurately reflects the Appellate Court's reasoning.

appropriate constitutional law to a claim raised before it. While advocates should know the law applicable to a claim, their ignorance neither changes the law nor justifies a deliberate departure from it.

Likewise, well-settled principles of law lead to the conclusion that the good-faith exception to the exclusionary rule should be applied to the facts of this case. While the decision of this Court in United States v. Leon, __ U.S. _, 104 S. Ct. 3405 (1984) marked a departure from prior law, it cannot be said that the respondent relied to his detriment upon prior law or that the administration of justice would be adversely affected by application of the exception to cases pending on direct review at the time it was rendered. Moreover, whether Leon should be applied to cases pending on direct review raises a significant question not yet expressly resolved by this Court but

that is sure to be presented in many other cases throughout the country.

1. There is no question that the State, like the trial court, and initially the Appellate Court, assumed that, because of the avowed purpose behind the officers' stop of the respondent's vehicle, probable cause would be required to justify the stop under the Fourth Amendment. That assumption was, of course, erroneous; see Scott v. United States, 436 U.S. 128, 138 (1978), ("the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action"); United States v. Robinson, 414 U.S. 218, 236 (1973); 1 LaFave, Search and Seizure § 3.2(b) (1st ed. 1978); see also, New York v. Quarles, __ U.S. __, 104 S. Ct. 2626, 2632 (1984) ("public safety"

exception to the Miranda requirements applies regardless of the "subjective motivation of the arresting officer"); as the Appellate Court itself later acknowledged. Compare, State v. Martin, App. A, infra, 8a (original opinion) (officers' avowed purpose in making the stop activated higher standard of probable cause) with State v. Martin, App. B, infra, 20a (amended opinion) (Fourth Amendment analysis does not look to the subjective state of mind of police but to whether circumstances, "viewed objectively" justify the action). Nevertheless, the Appellate Court concluded that the State's failure to argue below or before it that the stop could, objectively, be justified upon a showing of less than probable cause precluded it from obtaining reargument and reconsideration of the claim under the proper Fourth Amendment standard. The result is that all of the evidence in a serious narcotics case has been excluded and

a criminal will go free where it is virtually undisputed that, judged by the appropriate standard, no Fourth Amendment violation occurred.

The State does not seek to minimize the importance of state rules of practice, which ordinarily require that claims of law be distinctly raised in the trial court.[5] See Conn. Prac. Bk. § 3063 (Rev. to 1984).[6] But the alleged violation of some

---

[5] This case differs from the ordinary one in which a claim is simply not raised and, therefore, not considered at all below. In this case, the trial court and the Appellate Court were confronted with the claim that the defendant's Fourth Amendment rights were violated when he was stopped by the police. To resolve that claim, both courts were obliged to apply Fourth Amendment law to the facts of the case. That responsibility is not enlarged or diminished by the parties' failure to point out what the Fourth Amendment might require.

Nor would this Court's consideration of the claim under the appropriate standard be somehow unfair to the respondent. No party has a vested right in the misapplication of the law.

[6] Even Connecticut rules of practice and the decisions applying them recognize that, in the interests of justice, plain error that would result in a miscarriage of justice should be recognized by the courts. See Conn. Prac. Bk. §§ 3063, 3165; State v. Burke, 182 Conn. 330, 331, 438 A.2d 93 (1980)

state rule of practice that results in the refusal to apply controlling federal law is not ipso facto an adequate independent state ground for sustaining the judgment. That is because it is the function of this Court to decide whether an alleged independent state ground is "adequate," so as to bar federal review. Staub v. City of Baxley, 355 U.S. 313, 318 (1958). Thus, as this Court said in Staub, ". . . the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." Id., at 319. The question in the federal forum is whether a state procedural rule serves "a legitimate state interest." Henry v. Mississippi, 379 U.S. 443, 447-48 (1965). See also, id. at 448 n.3, Michigan v. Tyler, 436 U.S. 499, 512 n.7 (1978); Camp v. Arkansas, 404 U.S. 69 (1969) (per

---

(state supreme court noticed as plain error the failure of parties and the lower court to recognize controlling statute).

curiam), rev'g and remanding 249 Ark. 1075, 467 S.W.2d 707 (1971).

There can be little doubt that the rule of procedure used to prevent consideration of the State's argument here served no legitimate state interest. That is because no state has a legitimate interest in misapplication of the law. Thus, a party's "procedural default" should not relieve a court from applying federal law to a properly raised federal claim.[7] Such a rule would only perpetrate ignorance and undermine the dignity and constitutional responsibility of the judiciary. Hence, while it is always desirable for parties to identify for the court controlling law on issues presented, no "legitimate state interest" is served by a court blinding its

---

[7] If a party seeks to raise a federal claim but fails to comply with reasonable state procedural rules in doing so, there would be no question that adequate independent state grounds would bar federal review. Wainwright v. Sykes, 433 U.S. 72, 86-87 (1976); Henry v. Mississippi, 379 U.S. 443 (1965).

eyes to applicable law simply because it is discovered late in the day. Cf. Wainwright v. Sykes, 433 U.S. 72, 88 (1976) (need to develop factual record for federal claim rendered non-compliance with contemporaneous objection rule a proper ground to preclude federal review). Indeed, any state interest in this context should more properly be identified as the fair and informed resolution of federal claims.

The State does not argue, of course, that a party may fail to articulate a federal claim and that the court would be obliged to discern one simply from the facts of the case. Any such rule would require the court to abandon its judicial role and assume the role of advocate. What the state contends is that, once a litigant has raised a federal claim, it is the court's obligation to apply federal law to the claim.

2. Allowing the Appellate Court's decision to stand would have the effect of

permitting a state court to use an alleged procedural default as a tool for enlarging the scope of constitutional protections. Yet state courts "can neither add to nor subtract from the mandates of the United States Constitution." North Carolina v. Butler, 441 U.S. 369, 376 (1979); Oregon v. Hass, 420 U.S. 714 (1975). Since it is clear that the constitutional validity of the stop in this case would depend on whether it was justified by reasonable and articulable suspicion; Delaware v. Prouse, 440 U.S. 648, 663 (1979); and since it was virtually undisputed that reasonable suspicion existed in this case; State v. Martin, App. B infra, 26a (this was a "close case" on existence of probable cause; officers "may well have [had] reasonable and articulable suspicion that the predicted drug sale was taking place"); allowing the Appellate Court's decision to stand would sanction the exclusion of evidence on

federal grounds in the absence of a Fourth Amendment violation. In a day in which the proper application of the exclusionary rule is costly enough; United States v. Leon, __ U.S. __, 104 S. Ct. 3405, 3413 (1984); it is inconceivable that its misapplication could be countenanced and encouraged.

3. It is also apparent that the reasonable good-faith exception to the exclusionary rule should be applied to cases pending on direct review at the time the decision was announced. The general rule, stated in United States v. Johnson, 457 U.S. 537 (1982), is that a "decision of this Court construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered." Id. at 562. One of the exceptions to this rule is that a rule of criminal procedure that is a clear break with the past is "almost invariably . . . nonretroactive." Id. at 549.

While it is true that the rule of Leon was a clear break with the past, it does not follow that its application to cases pending on direct review is barred. A substantial factor in deciding whether new principles of Fourth Amendment law should be retroactively applied is the impact such an application would have on the reasonable reliance either party may have placed on prior law. See United States v. Sager, 743 F.2d 1261, 1263-64 (8th Cir. 1984) (Leon applied on petition for rehearing to case on direct review through good-faith exception not earlier raised). Where, as in the great majority of the cases, the new principle expanded the rights of criminal defendants, the question to be answered was whether retroactive application of the holding would in effect punish law enforcement officers who had reasonably relied upon prior law. See, Solem v. Stumes, __ U.S.

__, 104 S. Ct. 1338, 1341, 1343-45 (1984); United States v. Johnson, 457 U.S. at 549.

In this case, however, the new rule advances law enforcement interests by restricting application of the exclusionary rule. The question thus becomes whether the respondent could be said to have reasonably relied to his detriment on the absence of a good-faith exception to the exclusionary rule. The question compels the answer. The respondent certainly did not plan the drug transaction in this case in reliance on the exclusionary rule as it existed in 1981; that is especially so since there is no indication that the respondent even anticipated police detection in this case. See United States v. Sager, 743 F.2d at 1264.

It is also clear that the administration of justice would not be adversely affected by retroactive application of the Leon rule. See Solem v. Stumes, 104 S. Ct. at 1343, 1345. Indeed, to apply the exclu-

sionary rule when the reason for the rule, i.e., deterrence of police misconduct, does not exist would only thwart and not advance the administration of justice. United States v. Leon, 104 S. Ct. at 3419 (1984).

Moreover, this Court has strongly suggested that it would take this position by a recent decision in an analogous context. In Massachusetts v. Upton, __ U.S. __, 104 S. Ct. 2085 (1984) (per curiam), this Court applied retroactively the Illinois v. Gates, 462 U.S. 213 (1983) test for probable cause, which is both a break with the past and more favorable to the government. Yet, the opinion in Upton gives no hint that the retroactive application of Gates is anything but appropriate.

Finally, on the day that Leon was decided, the Court vacated and remanded for further consideration in light of Leon several cases then pending before it. United States v. Cassity, __ U.S. __, 104 S.

Ct. 3581 (1984); United States v. Tate, __ U.S. __, 104 S. Ct. 3575 (1984); United States v. Crozier, __ U.S. __, 104 S. ct. 3575 (1984).[8] These summary decisions would appear to be clear support for the proposition that the holding of Leon should be given full effect to cases pending on direct review.[9]

4. Any claim that the record as it now exists in this case is inadequate to decide the good-faith issue is without merit. The Leon rule, as the opinion carefully points out, does not turn on subjective good faith, which would usually be a question of fact that is not appropriate for appellate determination. United States v. Leon, supra, 3420 n.20, 3421 n.23

---

[8] In fact, the government's petition for a writ of certiorari in United States v. Cassity, supra, does not even raise the question whether the exclusionary rule should be modified.

[9] Whether the good-faith exception enunciated in Leon would apply to a case involving, not a warrant, but a simple good-faith mistake in the determination of probable cause is a question that would be answered on any remand.

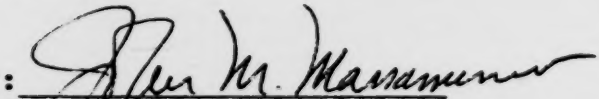
("We emphasize that the standard of reasonableness we adopt is an objective one"; "we also eschew inquiries into the subjective beliefs of law enforcement officers who seize evidence pursuant to a subsequently invalidated warrant"; "our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization"). Because the record in this case is fully adequate for a determination of whether the officers acted with an objectively reasonable good-faith belief that the stop, arrest, and subsequent search were lawful, there is no need for further trial court findings and a remand of the case to the Appellate Court would be appropriate. See United States v. Sager, 743 F.2d at 1265.

CONCLUSION

For the reasons set out above, the Petition for a Writ of Certiorari should be granted and the judgment of the Connecticut Appellate Court reversed or, in the alternative, the case should be remanded to the Appellate Court for further consideration in light of this Court's decision in United States v. Leon, __ U.S. __, 104 S. Ct. 3405 (1984).

Respectfully submitted.

THE STATE OF CONNECTICUT
Petitioner

By: 

JOHN M. MASSAMENO
Assistant State's Attorney
Division of Criminal Justice
Office of the Chief State's Attorney
340 Quinnipiac Street
Wallingford, CT 06492
(203) 265-2373
Counsel of Record for the Respondent

With whom on the Brief:

AUSTIN J. McGUIGAN
Chief State's Attorney

April 1985

No. _____

In The
Supreme Court Of The United States

OCTOBER TERM, 1984

STATE OF CONNECTICUT
Petitioner

v.

ALAN H. MARTIN
Respondent

APPENDIX
OF THE
PETITIONER

STATE OF CONNECTICUT *v.* ALAN H. MARTIN
(2676)

DANNEHY, C.P.J., DUPONT and BORDEN, Js.

The state, on the granting of permission by the trial court, appealed from that court's dismissal with prejudice of the information charging the defendant with the crimes of illegal possession of a narcotic substance and of illegal possession of a controlled substance. Prior to its dismissal of the information, the trial court had granted the defendant's motion to suppress certain substances which had been seized from his car after

a warrantless search of that vehicle. Because, under the totality of the circumstances, the search of the defendant's vehicle was based on less than probable cause, the trial court correctly granted the motion to suppress.

Argued May 3—decision released September 18, 1984

Information charging the defendant with the crimes of possession of a narcotic substance and of possession of a controlled substance, brought to the Superior Court in the judicial district of Danbury, geographical area number three, where the court, *McGrath, J.*, granted the defendant's motion to suppress certain material and dismissed the information, from which the state, with the permission of the trial court, appealed. *No error.*

Richard D. Arconti, assistant state's attorney, for the appellant (state).

Emanuel Margolis, with whom were *Judith Rosenberg* and, on the brief, *Tracy A. Saxe*, for the appellee (defendant).

BORDEN, J. This is an appeal[1] by the state taken with the permission of the trial court, pursuant to General Statutes § 54-96 and Practice Book § 819, from the judgment of the court dismissing the information with prejudice, following the granting of the defendant's motion to suppress. We find no error.[2]

[1] This appeal, originally filed in the Supreme Court, was transferred to this court. Public Acts, Spec. Sess., June, 1983, No. 83-29, § 2 (c).

[2] While this case was on appeal to this court, the United States Supreme Court held that the exclusionary rule, as effected by a motion to suppress such as is involved here, "should be modified so as not to bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." *United States* v. *Leon*, U.S. (52 U.S.L.W. 5155, July 5, 1984); *Massachusetts* v. *Sheppard*, U.S. (52 U.S.L.W. 5177, July 5, 1984). This case involves not a search pursuant to a search warrant but a warrantless search, which neither *United States* v. *Leon*, supra, nor *Massachusetts* v. *Sheppard*, supra, addresses. Moreover, the state did not claim

The defendant was charged in an information with illegal possession of a narcotic substance in violation of then General Statutes (Rev. to 1981) § 19-481 (a), now General Statutes § 21a-279 (a), and with illegal possession of a controlled substance in violation of then General Statutes (Rev. to 1981) § 19-481 (c), now General Statutes § 21a-279 (c). He moved to suppress certain substances which the state claimed were cocaine and methaqualone and which had been seized from his car after a warrantless search.

In a comprehensive memorandum of decision, the trial court found the following facts. On August 26, 1981, at approximately 10:30 p.m., Lieutenant Dennis Cooney, the desk officer of the Danbury police department, answered a telephone call and was told by the caller that "there is a blue Corvette out-of-state plate that will be going to the Foundry in about twenty minutes to deal in a large amount of cocaine." The caller, whose voice was unknown to Cooney, did not identify himself. Cooney put out a radio call requesting Detective John Merullo to telephone him.

Merullo had been a member of the Danbury police department for thirteen and one-half years, had worked with the special investigative unit (SIU) of the department involved in narcotics investigations, and had been assigned for the past year to the statewide narcotics task force. Merullo telephoned Cooney from a telephone located at the rear of the headquarters. Cooney told him of the caller's message. Merullo, accompanied by Detective William Hull, used his personal vehicle to

in the trial court a good faith exception to the exclusionary rule for this warrantless search, as it could have. Cf. *United States* v. *Leon*, supra. Thus, there was no occasion for the trial court to make such an initial determination. Nor did the state claim such an exception in this court. Under these circumstances, we decide this case on the basis of what we understand to be the current state of constitutional law, which is that the exclusionary rule applies to warrantless searches.

drive to the Foundry Cafe, which took about five minutes. Upon arriving, Merullo checked the parking lot for a blue Corvette and found none. He parked his vehicle so that he could observe the cafe and the entrance to the parking lot.

Approximately ten minutes later, he saw a blue Corvette with New Hampshire license plates enter the lot and park near two flood lights which were attached to the cafe building and which were about ten feet from a covered walkway. The walkway was the entrance to the cafe and to stores located on the second floor. The area in which the Corvette was parked was well lit. Merullo telephoned the department to check the ownership of the Corvette[3] and to determine if there were any outstanding warrants on it. He also asked Cooney to contact Sargeant James McNamara and Detective Harold Chapman of SIU.

Merullo saw two people leave the Corvette: the operator, a tall white male, later identified as the defendant, and the passenger, a tall white blonde female. They both entered the covered walkway. Merullo assumed they were going to the cafe. Fifteen minutes later the defendant left the walkway accompanied by another male, and they both entered the Corvette. Merullo recognized the other male as Dominic Cristello. At that point there was nothing suspicious about their behavior. The Corvette had tinted windows which prohibited seeing into its interior. A few minutes later, the Corvette was driven to another area where it parked. This was an unlighted area, and Merullo had to move his vehicle in order to keep the Corvette in view. Merullo did not know the operator of the Corvette but he knew, from conversations that he had had with fellow police officers discussing the cafe and drug traffic and from

[3] The court did not specifically find that the Corvette was owned by the defendant, but our examination of the transcript indicates that it was undisputed that Merullo's check disclosed that to be the case.

having reviewed Cristello's police file, that Cristello frequented the cafe and had been convicted of a drug charge eight years before.

McNamara and Chapman arrived. Merullo explained everything that had occurred up to the time of their arrival. He told McNamara that he believed that he had probable cause to search the Corvette, and that he intended to do so. It was agreed that McNamara would drive his vehicle to the area where the Corvette was parked. Merullo drove his vehicle and parked directly behind the Corvette; McNamara stopped his vehicle in front of the Corvette so that it was boxed in. Merullo immediately left his vehicle and went to the Corvette to search it. He approached the operator's side, badge in hand, and identified himself as a police officer. He requested that the window be rolled down and it was rolled down partially. He asked the operator, who was the defendant, for his license and registration. Because he could not see into the vehicle due to the tinted glass, for his own protection he opened the door of the Corvette. Upon his doing so, the interior light went on. Merullo stood by the door and saw the defendant trying to find his registration. He also saw the defendant putting a small amber bottle and a small spoon on the floor between his legs. Merullo knew that such a bottle and spoon were commonly used for carrying and snorting cocaine. Merullo told the defendant that he was under arrest. The officers searched the Corvette for five minutes, and found in the back an overnight bag containing a plastic bag of cocaine and a paper bag containing money.

The court specifically found that Merullo's approach to the Corvette was not for purposes of investigation but was for the purpose for searching the vehicle; that the defendant was seized, within the meaning of the fourth and fourteenth amendments to the United States constitution, when the police boxed in the Corvette and

approached it with the intent to search it; and that the request for the defendant's license and registration was pretextual.

The memorandum of decision of the trial court, which was filed on June 1, 1983, analyzed the search and seizure here under the then familiar principles of *Spinelli* v. *United States,* 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969), and *Aguilar* v. *Texas,* 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964). Those principles had been understood to require a reviewing court to gauge the reliability of information given by an informant according to a two-pronged test analyzing (1) the basis of the informant's knowledge—the means by which he acquired his information, and (2) the underlying facts establishing either his general veracity or his reliability in the particular case. See *Illinois* v. *Gates,* U.S. , 103 S. Ct. 2317, 2327, 76 L. Ed. 2d 527 (1983). Beginning with this analysis, which was the proper starting point at that time, the court concluded that the informant's tip was unreliable and "therefore [was] to be treated as if it never existed," and further concluded that the seizure was without probable cause. The court granted the motion to suppress the items seized from the Corvette, namely the amber bottle and its contents, the spoon, the overnight bag and its contents, and the paper bag and its contents.

On June 8, 1983, the United States Supreme Court decided *Illinois* v. *Gates,* supra, in which it abandoned the *Aguilar-Spinelli* test in favor of a determination of probable cause based on the totality of the circumstances.[4] Both parties to this appeal agree, as do we, that the test of *Illinois* v. *Gates,* supra, must be applied to the facts of this case.

[4] Subsequently, the United States Supreme Court made it even more clear that in *Gates* it "did not merely refine or qualify the 'two-pronged test.' We rejected it as hypertechnical and divorced from 'the factual and practical considerations of everyday life on which reasonable and prudent men,

We believe that the trial court went too far in saying that it must completely disregard the anonymous tip. The fact of the tip, the degree to which it contained details and the degree to which those details were corroborated were part of the totality of the circumstances test which a court must use in passing on a claim of probable cause. Id. "While a conscientious assessment of the basis for crediting such tips is required by the Fourth Amendment, a standard that leaves virtually no place for anonymous citizen informants is not." Id., 2332. Applying the totality of the circumstances test here, we conclude nonetheless that the trial court was correct in granting the motion to suppress.

The court found that the defendant was "seized," in constitutional parlance, when the officers boxed in the Corvette with their vehicles and approached it with the intent to search. A person is seized when, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *State* v. *Ostroski,* 186 Conn. 287, 291–92, 440 A.2d 984, cert. denied, 459 U.S. 878, 103 S. Ct. 173, 74 L. Ed. 2d 142 (1982), quoting *United States* v. *Mendenhall,* 446 U.S. 544, 553–54, 100 S. Ct. 1870, 64 L. Ed. 2d 497, reh. denied, 448 U.S. 908, 100 S. Ct. 3051, 65 L. Ed. 2d 1138 (1980); *Florida* v. *Royer,* U.S. , 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983). "Whether there has been such a seizure in an individual case is a question of fact." *State* v. *Ostroski,* supra, 292. "[S]topping an automobile and detaining its occupants constitute a 'seizure' within the meaning of [the fourth and fourteenth] Amendments, even though the purpose of the stop is limited and the resulting deten-

not legal technicians, act.' . . . Our statement on that score was explicit. '[W]e conclude that it is wiser to abandon the "two-pronged test" established by our decisions in Aguilar and Spinelli. In its place we reaffirm the totality of the circumstances analysis that traditionally has informed probable cause determinations.' " *Massachusetts* v. *Upton,* U.S. (52 U.S.L.W. 3822, 3823, May 15, 1984) (per curiam).

tion quite brief." *Delaware* v. *Prouse,* 440 U.S. 648, 653, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979). The court was correct in its factual determination of when the defendant was seized.

It is true that under some circumstances a seizure of an automobile and its occupants may permissibly take place on less than probable cause, such as where there is an investigative stop based on reasonable and articulable suspicion. See, e.g., *Delaware* v. *Prouse,* supra; *State* v. *Januszewski,* 182 Conn. 142, 438 A.2d 679 (1980), cert. denied, 453 U.S. 922, 101 S. Ct. 3159, 69 L. Ed. 2d 1005 (1981). Here, however, the trial court specifically found that when the defendant reentered the Corvette with Cristello there was nothing suspicious about his behavior, that the officers seized him and his Corvette with the intention, not to investigate, but to search, and that the request for his license and registration was a pretext. Thus, this was not an investigative stop. Under these circumstances, the seizure must have been based on probable cause in order to be valid.

Although *Illinois* v. *Gates,* supra, involved a search and seizure pursuant to a warrant, as did *Aguilar* and *Spinelli,* the same standards of probable cause apply to a warrantless search and seizure. See, e.g., *United States* v. *Smith,* 598 F.2d 936, 937 n.2 (5th Cir. 1979).[5] Probable cause deals " 'with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' " *Illinois* v.

[5] Of course, where the search and seizure are pursuant to a warrant, a more "deferential standard of review is appropriate to further the Fourth Amendment's strong preference for searches conducted pursuant to a warrant." *Massachusetts* v. *Upton,* U.S. (52 U.S.L.W. 3822, 3823, May 15, 1984) (per curiam); see also *State* v. *Zindros,* 189 Conn. 228, 253-54, 456 A.2d 288 (1983), cert. denied, U.S. , 104 S. Ct. 1014, 79 L. Ed. 2d 244 (1984).

Gates, supra, 2328. "Probable cause means more than mere suspicion. There must be facts and circumstances within the officer's knowledge, and of which he has trustworthy information, sufficient to justify the belief of a reasonable person that an offense has been or is being committed. . . . There is often a fine line between mere suspicion and probable cause, and '[t]hat line necessarily must be drawn by an act of judgment formed in the light of the particular situation and with account taken of all the circumstances.' " *State* v. *Penland,* 174 Conn. 153, 155–56, 384 A.2d 356, cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978). In the context of a search, there must be probable cause to believe that the material to be seized is connected with criminal activity or will assist in a particular apprehension or conviction, and that the material will be found in the place to be searched. *State* v. *DeChamplain,* 179 Conn. 522, 528–29, 427 A.2d 1338 (1980). Of particular significance here is the reminder of the United States Supreme Court: " 'The process [of determining probable cause] does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *Illinois* v. *Gates,* supra, 2328, quoting *United States* v. *Cortez,* 449 U.S. 411, 418, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981).

Applying this test to the seizure which occurred here, we conclude that it was based on less than probable cause. While the informant's tip was a permissible starting point, it lacks sufficient detail and it was not followed by sufficient corroborative behavior to raise

the totality of the circumstances from the level of suspicion to the level of probable cause. Cf. *Illinois* v. *Gates,* supra.

The state seeks to support this search by pointing to certain circumstances concerning which Merullo testified, but which the court did not find as facts. This evidence is that Cristello was known as a narcotics user and dealer; that the police were aware of ongoing drug activity at the cafe; that drug transactions commonly take place in the area of bars and nightclubs; that the dark tinted windows of the Corvette are the type often used in drug transactions; and that the area to which the Corvette was moved was secluded. We need not decide whether this evidence, if credited by the trial court, taken together with the other facts which the court did find, would have supplied a sufficient underpinning for this search. Suffice it to say that the court issued a factually detailed memorandum of decision which did not refer to this evidence. When the court rules on a motion to suppress without detailing the facts supporting its decision, an appellate court may look to the evidence produced in support of the ruling. See, e.g., *State* v. *Jones,* 193 Conn. 70, 475 A.2d 1087 (1984). But where, as here, the trial court performs its judicial function conscientiously by detailing the facts which the state has established, we are not free to add facts which are not found and which are not undisputed. See *State* v. *Perez,* 181 Conn. 299, 302–303, 435 A.2d 334 (1980). We thus address this search shorn of those "facts" which the state seeks to add.

The state concedes in its brief that the arrival of the Corvette at the predicted time and place was insufficient to establish probable cause. It argues, however, that what took place thereafter supplied sufficient corroboration of the tip to establish probable cause under *Illinois* v. *Gates,* supra. We disagree.

We note that although *Gates* abandoned the rigid *Aguilar-Spinelli* test to be applied to informer's tips, it specifically retained the process of examining, in the context of the totality of the circumstances, the "informant's 'veracity,' 'reliability' and 'basis of knowledge' [as] all highly relevant in determining the value of his report." Id., 2327. We note also that *Gates* focused its analysis on three basic types of informer's tips: those from a particular informant known for the reliability of his predictions of certain types of criminality in a certain area; those from an unquestionably honest citizen who comes forward with a report of criminal activity, which if fabricated would subject him to criminal liability; and those from an informant who, although his motives may be open to question, supplies an explicit and detailed description of alleged wrongdoing, along with an indication that the event was observed first-hand, thus entitling the tip to greater weight than might otherwise be the case. Id., 2329–30.

It is this third type which provides the starting point of our analysis in this case; for, under *Gates,* where the tip involves a prediction of future activity, it is not necessary that the tipster himself indicate a basis of first-hand knowledge, as long as the detail of the tip indicates a "fair probability" that the information came from the target of the tip or from someone whom the target trusted, and as long as that probability was provided by corroboration of the "major portions" of the tipster's predictions. Id., 2336.

Here, the amount of the detail in the tip, which Merullo's investigation corroborated, was moderate, to say the most. It amounted to the color and make of an automobile with out-of-state plates, and the estimated time and place of its arrival. Compare, e.g., the amount of detail supplied by the anonymous letter-writer in *Illinois* v. *Gates,* supra; and the amount of detail supplied by the known informant in *Draper* v. *United*

States, 358 U.S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327 (1959), described by the court in *Gates* as "the classic case on the value of corroborative efforts of police officials." Id., 2334. What followed the defendant's arrival at the cafe at the generally predicted time and in a vehicle which fit the general description given in the tip was that the defendant left the vehicle with one person, returned with another who had an eight year old drug conviction, and moved the vehicle from an illuminated area to an unilluminated area. While this activity may well have given Merullo reasonable and articulable suspicion that the predicted drug sale was taking place, and while this is a close case, we cannot say that the amount of the detail originally supplied was enough, and that it was sufficiently corroborated by further detail, so as to establish a fair probability that the anonymous tipster here had obtained his information either from the defendant or from someone whom the defendant trusted. Cf. *Illinois* v. *Gates,* supra; *Massachusetts* v. *Upton,* supra. We are mindful that " '[b]ecause an informant is right about some things, he is more probably right about other facts . . . .' " *Illinois* v. *Gates,* supra, 2335, quoting *United States* v. *Spinelli,* supra, 427. Unlike *Gates,* however, in which the anonymous letter "contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted"; *Illinois* v. *Gates,* supra, 2335; the nature of the tip and its corroboration here were insufficient to afford " 'a substantial basis for crediting the' " tip. Id. Thus, we conclude that the search was based on less than probable cause.

There is no error.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ALAN H. MARTIN
(2676)

DANNEHY, C.P.J., DUPONT and BORDEN, Js.

The state, on the granting of permission by the trial court, appealed from that court's dismissal with prejudice of the information charging the defendant with the crimes of illegal possession of a narcotic substance and of illegal possession of a controlled substance. Prior to its dismissal of the information, the trial court had granted the defendant's motion to suppress certain substances which had been seized from his car after

a warrantless search of that vehicle. Because, under the totality of the circumstances, the search of the defendant's vehicle was based on less than probable cause, the trial court correctly granted the motion to suppress.

Argued May 3—decision released September 18, 1984

Information charging the defendant with the crimes of possession of a narcotic substance and of possession of a controlled substance, brought to the Superior Court in the judicial district of Danbury, geographical area number three, where the court, *McGrath, J.*, granted the defendant's motion to suppress certain material and dismissed the information, from which the state, with the permission of the trial court, appealed. *No error.*

Richard D. Arconti, assistant state's attorney, for the appellant (state).

Emanuel Margolis, with whom were *Judith Rosenberg* and, on the brief, *Tracy A. Saxe,* for the appellee (defendant).

BORDEN, J. This is an appeal[1] by the state taken with the permission of the trial court, pursuant to General Statutes § 54-96 and Practice Book § 819, from the judgment of the court dismissing the information with prejudice, following the granting of the defendant's motion to suppress. We find no error.[2]

[1] This appeal, originally filed in the Supreme Court, was transferred to this court. Public Acts, Spec. Sess., June, 1983, No. 83-29, § 2 (c).

[2] While this case was on appeal to this court, the United States Supreme Court held that the exclusionary rule, as effected by a motion to suppress such as is involved here, "should be modified so as not to bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." *United States* v. *Leon,* U.S. (52 U.S.L.W. 5155, July 5, 1984); *Massachusetts* v. *Sheppard,* U.S. (52 U.S.L.W. 5177, July 5, 1984). This case involves not a search pursuant to a search warrant but a warrantless search, which neither *United States* v. *Leon,* supra, nor *Massachusetts* v. *Sheppard,* supra, addresses. Moreover, the state did not claim

The defendant was charged in an information with illegal possession of a narcotic substance in violation of then General Statutes (Rev. to 1981) § 19-481 (a), now General Statutes § 21a-279 (a), and with illegal possession of a controlled substance in violation of then General Statutes (Rev. to 1981) § 19-481 (c), now General Statutes § 21a-279 (c). He moved to suppress certain substances which the state claimed were cocaine and methaqualone and which had been seized from his car after a warrantless search.

In a comprehensive memorandum of decision, the trial court found the following facts. On August 26, 1981, at approximately 10:30 p.m., Lieutenant Dennis Cooney, the desk officer of the Danbury police department, answered a telephone call and was told by the caller that "there is a blue Corvette out-of-state plate that will be going to the Foundry in about twenty minutes to deal in a large amount of cocaine." The caller, whose voice was unknown to Cooney, did not identify himself. Cooney put out a radio call requesting Detective John Merullo to telephone him.

Merullo had been a member of the Danbury police department for thirteen and one-half years, had worked with the special investigative unit (SIU) of the department involved in narcotics investigations, and had been assigned for the past year to the statewide narcotics task force. Merullo telephoned Cooney from a telephone located at the rear of the headquarters. Cooney told him of the caller's message. Merullo, accompanied by Detective William Hull, used his personal vehicle to

in the trial court a good faith exception to the exclusionary rule for this warrantless search, as it could have. Cf. *United States* v. *Leon*, supra. Thus, there was no occasion for the trial court to make such an initial determination. Nor did the state claim such an exception in this court. Under these circumstances, we decide this case on the basis of what we understand to be the current state of constitutional law, which is that the exclusionary rule applies to warrantless searches.

drive to the Foundry Cafe, which took about five minutes. Upon arriving, Merullo checked the parking lot for a blue Corvette and found none. He parked his vehicle so that he could observe the cafe and the entrance to the parking lot.

Approximately ten minutes later, he saw a blue Corvette with New Hampshire license plates enter the lot and park near two flood lights which were attached to the cafe building and which were about ten feet from a covered walkway. The walkway was the entrance to the cafe and to stores located on the second floor. The area in which the Corvette was parked was well lit. Merullo telephoned the department to check the ownership of the Corvette[3] and to determine if there were any outstanding warrants on it. He also asked Cooney to contact Sargeant James McNamara and Detective Harold Chapman of SIU.

Merullo saw two people leave the Corvette: the operator, a tall white male, later identified as the defendant, and the passenger, a tall white blonde female. They both entered the covered walkway. Merullo assumed they were going to the cafe. Fifteen minutes later the defendant left the walkway accompanied by another male, and they both entered the Corvette. Merullo recognized the other male as Dominic Cristello. At that point there was nothing suspicious about their behavior. The Corvette had tinted windows which prohibited seeing into its interior. A few minutes later, the Corvette was driven to another area where it parked. This was an unlighted area, and Merullo had to move his vehicle in order to keep the Corvette in view. Merullo did not know the operator of the Corvette but he knew, from conversations that he had had with fellow police officers discussing the cafe and drug traffic and from

[3] The court did not specifically find that the Corvette was owned by the defendant, but our examination of the transcript indicates that it was undisputed that Merullo's check disclosed that to be the case.

having reviewed Cristello's police file, that Cristello frequented the cafe and had been convicted of a drug charge eight years before.

McNamara and Chapman arrived. Merullo explained everything that had occurred up to the time of their arrival. He told McNamara that he believed that he had probable cause to search the Corvette, and that he intended to do so. It was agreed that McNamara would drive his vehicle to the area where the Corvette was parked. Merullo drove his vehicle and parked directly behind the Corvette; McNamara stopped his vehicle in front of the Corvette so that it was boxed in. Merullo immediately left his vehicle and went to the Corvette to search it. He approached the operator's side, badge in hand, and identified himself as a police officer. He requested that the window be rolled down and it was rolled down partially. He asked the operator, who was the defendant, for his license and registration. Because he could not see into the vehicle due to the tinted glass, for his own protection he opened the door of the Corvette. Upon his doing so, the interior light went on. Merullo stood by the door and saw the defendant trying to find his registration. He also saw the defendant putting a small amber bottle and a small spoon on the floor between his legs. Merullo knew that such a bottle and spoon were commonly used for carrying and snorting cocaine. Merullo told the defendant that he was under arrest. The officers searched the Corvette for five minutes, and found in the back an overnight bag containing a plastic bag of cocaine and a paper bag containing money.

The court specifically found that Merullo's approach to the Corvette was not for purposes of investigation but was for the purpose for searching the vehicle; that the defendant was seized, within the meaning of the fourth and fourteenth amendments to the United States constitution, when the police boxed in the Corvette and

approached it with the intent to search it; and that the request for the defendant's license and registration was pretextual.

The memorandum of decision of the trial court, which was filed on June 1, 1983, analyzed the search and seizure here under the then familiar principles of *Spinelli* v. *United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969), and *Aguilar* v. *Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964). Those principles had been understood to require a reviewing court to gauge the reliability of information given by an informant according to a two-pronged test analyzing (1) the basis of the informant's knowledge—the means by which he acquired his information, and (2) the underlying facts establishing either his general veracity or his reliability in the particular case. See *Illinois* v. *Gates*, U.S. , 103 S. Ct. 2317, 2327, 76 L. Ed. 2d 527 (1983). Beginning with this analysis, which was the proper starting point at that time, the court concluded that the informant's tip was unreliable and "therefore [was] to be treated as if it never existed," and further concluded that the seizure was without probable cause. The court granted the motion to suppress the items seized from the Corvette, namely the amber bottle and its contents, the spoon, the overnight bag and its contents, and the paper bag and its contents.

On June 8, 1983, the United States Supreme Court decided *Illinois* v. *Gates*, supra, in which it abandoned the *Aguilar-Spinelli* test in favor of a determination of probable cause based on the totality of the circumstances.[4] Both parties to this appeal agree, as do we, that the test of *Illinois* v. *Gates*, supra, must be applied to the facts of this case.

[4] Subsequently, the United States Supreme Court made it even more clear that in *Gates* it "did not merely refine or qualify the 'two-pronged test.' We rejected it as hypertechnical and divorced from 'the factual and practical considerations of everyday life on which reasonable and prudent men,

We believe that the trial court went too far in saying that it must completely disregard the anonymous tip. The fact of the tip, the degree to which it contained details and the degree to which those details were corroborated were part of the totality of the circumstances test which a court must use in passing on a claim of probable cause. Id. "While a conscientious assessment of the basis for crediting such tips is required by the Fourth Amendment, a standard that leaves virtually no place for anonymous citizen informants is not." Id., 2332. Applying the totality of the circumstances test here, we conclude nonetheless that the trial court was correct in granting the motion to suppress.

The court found that the defendant was "seized," in constitutional parlance, when the officers boxed in the Corvette with their vehicles and approached it with the intent to search. A person is seized when, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *State* v. *Ostroski,* 186 Conn. 287, 291–92, 440 A.2d 984, cert. denied, 459 U.S. 878, 103 S. Ct. 173, 74 L. Ed. 2d 142 (1982), quoting *United States* v. *Mendenhall,* 446 U.S. 544, 553–54, 100 S. Ct. 1870, 64 L. Ed. 2d 497, reh. denied, 448 U.S. 908, 100 S. Ct. 3051, 65 L. Ed. 2d 1138 (1980); *Florida* v. *Royer,* 460 U.S. 501–502, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983). "Whether there has been such a seizure in an individual case is a question of fact." *State* v. *Ostroski,* supra, 292. "[S]topping an automobile and detaining its occupants constitute a 'seizure' within the meaning of [the fourth and fourteenth] Amendments, even though the purpose of the stop is limited and the resulting deten-

not legal technicians, act.' . . . Our statement on that score was explicit. '[W]e conclude that it is wiser to abandon the "two-pronged test" established by our decisions in Aguilar and Spinelli. In its place we reaffirm the totality of the circumstances analysis that traditionally has informed probable cause determinations.' " *Massachusetts* v. *Upton,* U.S. , 104 S. Ct. 2085, 2087–88, 80 L. Ed. 2d 721 (1984).

tion quite brief." *Delaware* v. *Prouse,* 440 U.S. 648, 653, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979). The court was correct in its factual determination of when the defendant was seized.

It is true that under some circumstances a seizure of an automobile and its occupants may permissibly take place on less than probable cause, such as when there is an investigative stop based on reasonable and articulable suspicion. See, e.g., *Delaware* v. *Prouse,* supra; *State* v. *Januszewski,* 182 Conn. 142, 438 A.2d 679 (1980), cert. denied, 453 U.S. 922, 101 S. Ct. 3159, 69 L. Ed. 2d 1005 (1981). It is also true that, ordinarily, the test for determining whether such a seizure should be measured by probable cause or by the less exacting standard of reasonable suspicion is objective, not subjective. See *State* v. *Januszewski,* supra. That is, the court should, in evaluating a search and seizure, look not to the subjective state of mind of the officer performing the search and seizure but to whether "the circumstances, viewed objectively, justify that action." *Scott* v. *United States,* 436 U.S. 128, 138, 98 S. Ct. 1717, 56 L. Ed. 2d 168 (1978); *United States* v. *Robinson,* 414 U.S. 218, 236, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973); 1 LaFave, Search and Seizure § 3.2 (b).

Here, however, the state did not seek in the trial court to justify this warrantless seizure on the basis that, objectively viewed, it was an investigative stop to be measured by reasonable and articulable suspicion. It did not claim reliance on either the applicability of an objective standard or the existence of facts meeting that standard. Instead, it sought to persuade the court that probable cause existed. Similarly, in this court, both its brief and its oral argument were based on the proposition that the activity of the police constituted a full-scale fourth amendment seizure requir-

ing probable cause. It was not until our original decision was released that the state, by a motion for reargument, for the first time, raised the claim that we review the seizure by the standard of reasonable and articulable suspicion.[5]

For several reasons, we decline to disturb our original decision and to reanalyze the case on the basis of the state's belated claim. First, the state did not follow the mandate of Practice Book § 285A to state this claim of law distinctly to the trial court. Thus, the trial court was not alerted to the opportunity to make additional factual findings which might have been relevant to the claim, and we were thus deprived of those findings and of a reasoned analysis of them by the trial court. See *Barrett* v. *Central Vermont Railway, Inc.*, 2 Conn. App. 530, 537, 480 A.2d 589 (1984). Second, the state did not follow the mandate of Practice Book § 3012, that this issue on appeal be indicated in its preliminary statement of issues, or of Practice Book § 3060F, that its brief concisely set forth this issue. See *Zoning Board of Appeals* v. *Bemis*, 2 Conn. App. 278, 477 A.2d 170 (1984). Third, whether there was, in any given set of circumstances, a reasonable and articulable suspicion is in the first instance a question of fact for the trial court; see *State* v. *Ostroski*, 186 Conn. 287, 292, 440 A.2d 984, cert. denied, 459 U.S. 878, 103 S. Ct. 173, 74 L. Ed. 2d 142 (1982); subject ordinarily to a limited scope of appellate review. *State* v. *Zindros*, 189 Conn. 228, 456 A.2d 288 (1983), cert. denied, U.S. , 104 S. Ct. 1014, 79 L. Ed. 2d 244 (1984).

[5] We granted the motion for reargument in part and ordered that supplemental briefs be filed. On November 19, 1984, without the necessity of further oral argument, we decided the motion, affirming our initial finding of no error and indicating that we would at a later date issue this revised opinion effective November 19, 1984. See *Wrinn* v. *Dunleavy*, 186 Conn. 125, 126, 440 A.2d 261 (1982).

Thus, it is particularly inappropriate for us to make such a determination after full briefing and argument which ignored that issue.

The rule that claims on appeal should first be made at trial " 'applies to criminal as well as civil cases.' " *State* v. *Johnson,* 166 Conn. 439, 445, 352 A.2d 294 (1974). That rule applies to the state as well as to the defendant. We therefore decide this case on the theory on which it was tried and decided in the trial court, and briefed and argued in this court. *Beckenstein* v. *Potter & Carrier, Inc.,* 191 Conn. 120, 132, 464 A.2d 6 (1983). That theory is that the seizure must have been based on probable cause in order to be valid.

Although *Illinois* v. *Gates,* supra, involved a search and seizure pursuant to a warrant, as did *Aguilar* and *Spinelli,* the same standards of probable cause apply to a warrantless search and seizure. See, e.g., *United States* v. *Smith,* 598 F.2d 936, 937 n.2 (5th Cir. 1979).[6] Probable cause deals " 'with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' " *Illinois* v. *Gates,* supra, 2328. "Probable cause means more than mere suspicion. There must be facts and circumstances within the officer's knowledge, and of which he has trustworthy information, sufficient to justify the belief of a reasonable person that an offense has been or is being committed. . . . There is often a fine line between mere suspicion and probable cause, and '[t]hat

[6] Of course, where the search and seizure are pursuant to a warrant, a more "deferential standard of review is appropriate to further the Fourth Amendment's strong preference for searches conducted pursuant to a warrant." *Massachusetts* v. *Upton,* U.S. , 104 S. Ct. 2085, 2088, 80 L. Ed. 2d 721 (1984); see also *State* v. *Zindros,* 189 Conn. 228, 253–54, 456 A.2d 288 (1983), cert. denied, U.S. , 104 S. Ct. 1014, 79 L. Ed. 2d 244 (1984).

line necessarily must be drawn by an act of judgment formed in the light of the particular situation and with account taken of all the circumstances.' " *State* v. *Penland,* 174 Conn. 153, 155–56, 384 A.2d 356, cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978). In the context of a search, there must be probable cause to believe that the material to be seized is connected with criminal activity or will assist in a particular apprehension or conviction, and that the material will be found in the place to be searched. *State* v. *DeChamplain,* 179 Conn. 522, 528–29, 427 A.2d 1338 (1980). Of particular significance here is the reminder of the United States Supreme Court: " 'The process [of determining probable cause] does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *Illinois* v. *Gates,* supra, 2328, quoting *United States* v. *Cortez,* 449 U.S. 411, 418, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981).

Applying this test to the seizure which occurred here, we conclude that it was based on less than probable cause. While the informant's tip was a permissible starting point, it lacks sufficient detail and it was not followed by sufficient corroborative behavior to raise the totality of the circumstances from the level of suspicion to the level of probable cause. Cf. *Illinois* v. *Gates,* supra.

The state seeks to support this search by pointing to certain circumstances concerning which Merullo testified, but which the court did not find as facts. This evidence is that Cristello was known as a narcotics user

and dealer; that the police were aware of ongoing drug activity at the cafe; that drug transactions commonly take place in the area of bars and nightclubs; that the dark tinted windows of the Corvette are the type often used in drug transactions; and that the area to which the Corvette was moved was secluded. We need not decide whether this evidence, if credited by the trial court, taken together with the other facts which the court did find, would have supplied a sufficient underpinning for this search. Suffice it to say that the court issued a factually detailed memorandum of decision which did not refer to this evidence. When the court rules on a motion to suppress without detailing the facts supporting its decision, an appellate court may look to the evidence produced in support of the ruling. See, e.g., *State* v. *Jones,* 193 Conn. 70, 475 A.2d 1087 (1984). But where, as here, the trial court performs its judicial function conscientiously by detailing the facts which the state has established, we are not free to add facts which are not found and which are not undisputed. See *State* v. *Perez,* 181 Conn. 299, 302–303, 435 A.2d 334 (1980). We thus address this search shorn of those "facts" which the state seeks to add.

The state concedes in its brief that the arrival of the Corvette at the predicted time and place was insufficient to establish probable cause. It argues, however, that what took place thereafter supplied sufficient corroboration of the tip to establish probable cause under *Illinois* v. *Gates,* supra. We disagree.

We note that although *Gates* abandoned the rigid *Aguilar-Spinelli* test to be applied to informer's tips, it specifically retained the process of examining, in the context of the totality of the circumstances, the "informant's 'veracity,' 'reliability' and 'basis of knowledge' [as] all highly relevant in determining the value of his report." Id., 2327. We note also that *Gates* focused its analysis on three basic types of informer's tips: those

from a particular informant known for the reliability of his predictions of certain types of criminality in a certain area; those from an unquestionably honest citizen who comes forward with a report of criminal activity, which if fabricated would subject him to criminal liability; and those from an informant who, although his motives may be open to question, supplies an explicit and detailed description of alleged wrongdoing, along with an indication that the event was observed first-hand, thus entitling the tip to greater weight than might otherwise be the case. Id., 2329–30.

It is this third type which provides the starting point of our analysis in this case; for, under *Gates,* where the tip involves a prediction of future activity, it is not necessary that the tipster himself indicate a basis of first-hand knowledge, as long as the detail of the tip indicates a "fair probability" that the information came from the target of the tip or from someone whom the target trusted, and as long as that probability was provided by corroboration of the "major portions" of the tipster's predictions. Id., 2336.

Here, the amount of the detail in the tip, which Merullo's investigation corroborated, was moderate, to say the most. It amounted to the color and make of an automobile with out-of-state plates, and the estimated time and place of its arrival. Compare, e.g., the amount of detail supplied by the anonymous letter-writer in *Illinois* v. *Gates,* supra; and the amount of detail supplied by the known informant in *Draper* v. *United States,* 358 U.S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327 (1959), described by the court in *Gates* as "the classic case on the value of corroborative efforts of police officials." Id., 2334. What followed the defendant's arrival at the cafe at the generally predicted time and in a vehicle which fit the general description given in the tip was that the defendant left the vehicle with one person, returned with another who had an eight year old

drug conviction, and moved the vehicle from an illuminated area to an unilluminated area. While this activity may well have given Merullo reasonable and articulable suspicion that the predicted drug sale was taking place, and while this is a close case, we cannot say that the amount of the detail originally supplied was enough, and that it was sufficiently corroborated by further detail, so as to establish a fair probability that the anonymous tipster here had obtained his information either from the defendant or from someone whom the defendant trusted. Cf. *Illinois* v. *Gates,* supra; *Massachusetts* v. *Upton,* supra. We are mindful that " '[b]ecause an informant is right about some things, he is more probably right about other facts . . . .' " *Illinois* v. *Gates,* supra, 2335, quoting *United States* v. *Spinelli,* supra, 427. Unlike *Gates,* however, in which the anonymous letter "contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted"; *Illinois* v. *Gates,* supra, 2335; the nature of the tip and its corroboration here were insufficient to afford " 'a substantial basis for crediting the' " tip. Id. Thus, we conclude that the search was based on less than probable cause.

There is no error.

In this opinion the other judges concurred.

84-1659 (3)

NO. 82-1659

Office - Supreme Court, U.S.
FILED
MAY 16 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF CONNECTICUT,

Petitioner,

V.

ALAN H. MARTIN,

Respondent.

ON WRIT OF CERTIORARI TO THE
CONNECTICUT SUPREME COURT

BRIEF OF AMICI CURIAE, DELAWARE, FLORIDA, INDIANA, LOUISIANA, MISSISSIPPI, MISSOURI, NEBRASKA, NEVADA, NEW HAMPSHIRE, NORTH CAROLINA, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, VERMONT, AND VIRGINIA*

OF COUNSEL:
SUSAN CRUMP
Assistant Professor of Law
South Texas College of Law

DAVID CRUMP
c/o The Legal Foundation
of America
South Texas College of Law
1303 San Jacinto
Houston, Texas 77002
(713) 659-8040
Counsel of Record

Each sponsored according to Rule 36.4 by its attorney general pursuant to list of counsel continued inside front cover

1100

List of Counsel continued:

Charles M. Oberly, Attorney General, State of Delaware
Jim Smith, Attorney General, State of Florida
Linley E. Pearson, Attorney General, State of Indiana
William J. Guste, Jr., Attorney General, State of Louisiana
Edwin Lloyd Pittman, Attorney General, State of Mississippi
William L. Webster, Attorney General, State of Missouri
Robert M. Spire, Attorney General, State of Nebraska
Brian McKay, Attorney General, State of Nevada
Gregory H. Smith, Attorney General, State of New Hampshire
Lacy H. Thornburg, Attorney General, State of North Carolina
Michael C. Turpen, Attorney General, State of Oklahoma
LeRoy S. Zimmerman, Attorney General, State of Pennsylvania
T. Travis Medlock, Attorney General, State of South Carolina
Mark V. Meierhenry, Attorney General, State of South Dakota
William M. Leech, Jr., Attorney General, State of Tennessee
Jeffrey Amestoy, Attorney General, State of Vermont
Gerald L. Baliles, Attorney General, Commonwealth of Virginia

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

REASONS FOR GRANTING WRIT 2

I. THE DECISION BELOW IS IN CONFLICT WITH THE DECISION OF A COURT OF APPEALS AND WITH PRIOR DECISIONS OF THIS COURT. 2

II. THE DECISION BELOW PRESENTS A SUBSTANTIAL QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT. 2

III. THE LOWER COURT DID NOT DECIDE THE APPLICABILITY OF SHEPPARD AND LEON TO WARRANTLESS SEARCHES; BUT IF IT HAD DONE SO, THAT ISSUE WOULD ALSO CONSTITUTE A QUESTION OF FEDERAL LAW WORTHY OF CERTIORARI AND CONTAINED WITHIN THE QUESTIONS PRESENTED HERE. 4

CONCLUSION 7

TABLE OF AUTHORITIES

CASES

Colorado v. Quintero, 103 S. Ct. 3535 (1983) 6
Illinois v. Gates, 462 U.S. 213 (1983) 4
Massachusetts v. Sheppard, 104 S. Ct. 3424 (1984) 1, 2, 3, 4, 5, 6, 7
Massachusetts v. Upton, 104 S. Ct. 2085 (1984) 4
Payton v. New York, 445 U.S. 573 (1980) 6
United States v. Cassity, 104 S. Ct. 3581 (1984) 2
United States v. Crozier, 104 S. Ct. 3575 (1984) 2
United States v. Johnson, 457 U.S. 537 (1982) 4
United States v. Leon, 104 S. Ct. 3405 (1984) 1, 2, 3, 4, 5, 6, 7
United States v. Morgan, No. 84-1357, 37 Cr. L. Rptr. 4030 (U.S. S.Ct. *petition for cert. filed* Feb. 25, 1985) 6
United States v. Sager, 743 F.2d 1261 (8th Cir. 1984) 2, 4
United States v. Tate, 104 S. Ct. 3575 (1984) 2
Williams v. United States, 622 F.2d 830 (5th Cir. 1980) 6

NO. 82-1659

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

STATE OF CONNECTICUT

Petitioner,

V.

ALAN H. MARTIN

Respondent.

BRIEF OF AMICI CURIAE

INTEREST OF AMICI CURIAE

Amici curiae are States that are parties to cases pending upon direct appeal in which exclusionary rule issues are presented. They submit that the objective good-faith principle of *United States v. Leon*, 104 S.Ct. 3405 (1984), and *Massachusetts v. Sheppard*, 104 S.Ct. 3424 (1984), should be applied to cases on direct review or on petition for habeas corpus. The number of such cases is substantial, and the cases in which review is sought tend to be the more serious criminal cases. For these reasons, and for those set forth below, amici urge this Court to grant the writ of certiorari.

Amici also note Connecticut's argument on the first Question Presented, which concerns a state court's duty correctly to decide federal claims properly put before it irrespective of the quality of briefing. Amici agree with this proposition and wish to express support for Connecticut's argument. This

brief, however, is confined to the second Question Presented, concerning the applicability of the good-faith principle.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS IN CONFLICT WITH THE DECISION OF A COURT OF APPEALS AND WITH PRIOR DECISIONS OF THIS COURT

As Connecticut has pointed out, the decision of the Eighth Circuit in *United States v. Sager*, 743 F.2d 1261, 1263-64 (8th Cir. 1984), applied the good-faith principle to a case pending on petition for rehearing, although the issue had not been raised at any earlier point in the trial or appellate courts. The decision in *Sager* is in conflict with the decision in the case at bar.

Further, as Connecticut has indicated, this Court's summary reversals in *United States v. Cassity*, 104 S.Ct. 3581 (1984); *United States v. Tate*, 104 S.Ct. 3575 (1984); and *United States v. Crozier*, 104 U.S. 3575 (1984), are in conflict with the decision below.

II. THE DECISION BELOW PRESENTS A SUBSTANTIAL QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

The question whether the objective good-faith principle of *Sheppard* and *Leon* should be applied to pending cases is a substantial question of federal law that has not been, but should be, decided by this Court. Two-tier review through a state court of appeals and a state supreme court can sometimes occupy many years. The most serious criminal cases occupy longer periods. Capital cases, for example, may require more than a decade for resolution. A substantial number of such cases presents exclusionary rule issues, and the appropriate standard for judging most of such cases would

be affected by *Sheppard* and *Leon*.

The cost of a refusal to apply *Sheppard* and *Leon* would be high. It would be reversal of convictions in which the defendant was fairly and appropriately found guilty and in which the principal question is one that would be controlled today by *Sheppard* and *Leon*. Those cases are explicitly based upon an assessment of the costs and benefits of exclusionary rule application in differing circumstances. *See Leon, supra*, 104 S.Ct. at 3412-13.

On the other hand, as Connecticut indicates, the cost of applying *Sheppard* and *Leon* to pending cases such as the present case would be low. No reliance interests would be invaded, because it is inconceivable that the respondent structured his transaction in reliance on earlier law. The issue can be decided on the existing record, because (as Connecticut has indicated) the question of good faith is to be determined by reference to objective factors. Furthermore, the briefing necessary to inform courts on questions pursuant to *Sheppard* and *Leon* is briefing upon questions they ultimately must decide in any event, concerning law that they must apply in all future cases.

Finally, nothing is lost in this situation by a rule that mandates a correct outcome under present law. In the case at bar, for example, the court below found the question to be a "close" one even under traditional probable cause analysis, in which the officers "may well have" had "reasonable and articulable" suspicion as a basis for their actions. Appendix at 26a. The court's own recognition that it was actually deciding the case under the wrong standard (which it refused to analyze differently because it had been initially led elsewhere by inadvertent errors in the briefing, Appendix at 21a-22a), is itself an example of the lopsided balance of cost and benefit that results when *Leon* and *Sheppard* are not applied. As *Leon* says, "[p]articularly when law enforcement officers have acted in good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system." 104 S.Ct. at 3413. Therefore, "as with any remedial device, the

application of the [exclusionary] rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *Id.* This approach is entirely consistent with the application of good faith to pending cases, such as the present case.

Substantial questions are further presented by the application of the test for retroactivity contained in *United States v. Johnson*, 457 U.S. 537 (1982), to the case at bar. As Connecticut demonstrates, the *Johnson* criteria support the application of *Sheppard* and *Leon* to pending cases. *See United States v. Sager, supra* (good faith applicable even though raised for the first time on rehearing, under traditional analysis); *cf. Massachusetts v. Upton*, 104 S.Ct. 2085 (1984) (application of *Illinois v. Gates*, 462 U.S. 213 (1983), to pending case).

III. THE LOWER COURT DID NOT DECIDE THE APPLICABILITY OF *SHEPPARD* AND *LEON* TO WARRANTLESS SEARCHES; BUT IF IT HAD DONE SO, THAT ISSUE WOULD ALSO CONSTITUTE A QUESTION OF FEDERAL LAW WORTHY OF CERTIORARI AND CONTAINED WITHIN THE QUESTIONS PRESENTED HERE.

The lower court's refusal to apply the good-faith principle is contained entirely within a single footnote. The court stated as follows:

> While this case was on appeal to this court, the United States Supreme Court held that the exclusionary rule, as effected by a motion to suppress such as is involved here, "should be modified so as not to bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." *United States v. Leon*, ____ U.S. ___ (52 U.S.L.W. 5155, July 5, 1984); *Massachusetts v. Sheppard*,

> ___U.S. ____ (52 U.S.L.W. 5177, July 5, 1984). This case involves not a search pursuant to a search warrant but a warrantless search, which neither *United States v. Leon, supra,* nor *Massachusetts v. Sheppard, supra,* addresses. Moreover, the state did not claim in the trial court a good faith exception to the exclusionary rule for this warrantless search, as it could have. *Cf. United States v. Leon, supra.* Thus, there was no occasion for the trial court to make such an initial determination. Nor did the state claim such an exception in this court. Under these circumstances, we decide this case on the basis of what we understand to be the current state of constitutional law, which is that the exclusionary rule applies to warrantless searches.

Appendix at 14a-15a n.2. The lower court's holding thus refuses to consider the question whether good faith is applicable to warrantless searches. It notes that *Sheppard* and *Leon* "do not address" the issue directly, and it holds that since the state had not raised the issue previously (which it is excused from doing since the principle did not exist as constitutional law), "under these circumstances," the court will apply current law (*i.e.*, the law as it has existed prior to an analysis whether good faith includes warrantless searches). In summary, Amici agree with Connecticut that whether the good-faith principle applies to warrantless searches "is a question that would be answered on any remand." Petition for Certiorari at n.9.

However, if and only if it should be argued by Respondent that the court below decided the question, by holding that good faith does not apply to warrantless searches, Amici would point out that such a holding would itself be worthy of certiorari and is squarely within the questions presented by Connecticut. Connecticut's statement of the questions presented includes "*Whether the Appellate Court erred in refusing to apply to the facts of this case the good-faith exception to the exclusionary rule,* enunciated while this case was pending decision on direct review." Petition for Certiorari at i (emphasis added).

The question whether good faith applies to warrantless searches, if it had been decided below, would clearly be worthy of the writ of certiorari. This Court has previously granted certiorari in a case presenting precisely the same question. *Colorado v. Quintero*, 103 S.Ct. 3535 (1983). The cause was dismissed in this Court owing to Quintero's death. 104 S.Ct. at 543 (1983). The question has been subject to conflicting holdings. *Compare, e.g., Colorado v. Quintero, supra with Williams v. United States*, 622 F.2d 830 (5th Cir. 1980) (en banc) (extending good faith principle to warrantless searches); *see also United States v. Morgan*, No. 84-1357, 37 Cr. L. Rptr. 4030 (U.S. S.Ct. petition for cert. filed Feb. 25, 1985). There are far more warrantless searches than there are searches with warrants.* There can be no doubt that the question would be a substantial one,** that should be addressed by this Court, if the lower court had decided it.

---

* Such searches occur in the course of police responses to personally viewed occurrences (as here), actions on information without time to obtain a warrant (as in Quintero), searches incident to arrest, Terry and Long frisks, inventories, border stops, and a wide variety of other circumstances. In most of these categories, there is the possibility that an officer's judgment in an uncontroverted situation is in clear objective good faith—as much so as if he relied on a warrant. Furthermore, most present situations in the field, where prompt decision is essential.

The fact situation in United States v. Morgan, supra, pending on petition for certiorari, is an example. A suspect directed by bullhorn to leave his mother's house was there held to have been arrested, as a practical matter, inside the house, even though the physical arrest took place outside. By this analysis, the Sixth Circuit concluded that this warrantless arrest violated Payton v. New York, 445 U.S. 573 (1980). The conclusion led to suppression of an automatic weapon that the accused, Morgan, had on his person when he came out to meet the police officers. The present case is also an example.

** The description of cost-benefit balance that Leon and Sheppard are based upon includes, in the balance, the impact of both warrantless search cases and cases with warrants. See Leon, supra, 104 S.Ct. at 3413 & n.6.

However, Amici present this argument merely in anticipation of the possibility that Respondent might argue that the question briefed by Connecticut—whether good faith applies to pending cases—is not squarely presented. Amici agree with Connecticut that the warrantless search issue was not addressed by the court below, because that court simply refused to apply *Sheppard* and *Leon* to this pending case. The warrantless search issue should be addressed on remand. In any event, that question should not prevent the court from granting the writ to decide the squarely presented and substantial question whether *Sheppard* and *Leon* apply to pending cases.

CONCLUSION

The decision below conflicts with the decision of the Eighth Circuit on the same issue. It conflicts with the prior holdings of this Court, which indicate that good faith is applicable to pending cases. The pendency of substantial dockets of cases before state and federal appellate courts justifies this Court's consideration of the question to provide for their correct resolution. This proposition is especially true since cases that are reviewed on appeal include the most serious criminal matters, some of which require a decade or more for resolution. The cost of applying *Sheppard* and *Leon* to these many cases would be low. The cost of refusing, as the lower court did, would be high. The writ of certiorari should be granted; or, in the alternative, the decision should be summarily reversed and remanded for reconsideration in light of *Sheppard* and *Leon*.

Respectfully submitted,

David Crump
Professor of Law
South Texas College of Law
c/o The Legal Foundation of America
1303 San Jacinto
Houston, Texas 77002
Attorney for Amici Curiae

Office - Supreme Court, U.S.
FILED
MAY 17 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1659

In the Supreme Court of the United States

October Term, 1984

STATE OF CONNECTICUT,

Petitioner,

v.

ALAN H. MARTIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

BRIEF OF RESPONDENT IN OPPOSITION

EMANUEL MARGOLIS
(Counsel of Record)
JUDITH ROSENBERG
777 Summer Street
Stamford, CT 06901
(203) 327-2300

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

BEST AVAILABLE COPY

44pp

QUESTIONS PRESENTED

1. Whether this is a case which warrants the extraordinary relief of certification.

2. Whether there exist adequate, independent state grounds so as to preclude federal review.

3. Whether the State's good-faith claim should be barred as both untimely and inapposite.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	4
CONCLUSION	16
APPENDIX	App. 1

TABLE OF AUTHORITIES

Page

CASES:

Hankerson v. North Carolina, 432 U.S. 233 (1977) 9

Henry v. Mississippi, 379 U.S. 433 (1965) 8, 10

Herndon v. Georgia, 295 U.S. 441 (1935), reh. den., 296 U.S. 661 11

Illinois v. Gates, 462 U.S. 213 (1983) 7, 9, 10, 11, 15

Mullaney v. Wilbur, 421 U.S. 684 (1975) 9

Reed v. Ross, 468 U.S. —, 104 S.Ct. 2901 (1984) 9, 10

State v. Martin, 2 Conn. App. 605 (1984) ..... *passim*

United States v. Leon, — U.S. —, 104 S.Ct. 3405 (1984) 12, 13, 14, 15, 16

United States v. Williams, 622 F.2d 830 (5th Cir. 1980) 10

Wainwright v. Sykes, 433 U.S. 72 (1976) 8, 9, 10, 13

Williams v. Georgia, 349 U.S. 375 (1955) 11

Yakus v. United States, 321 U.S. 414 (1944) 8

TABLE OF AUTHORITIES—Continued

Page

RULES OF COURT:

Sup. Ct. R. 17.1 ..... 4, 6
Sup. Ct. R. 20 1
Connecticut Practice Book, Sec. 285A 12
Connecticut Practice Book, Sec. 2000 13
Connecticut Practice Book, Sec. 3012 13
Connecticut Practice Book, Sec. 3060F 13
Connecticut Practice Book, Sec. 3063 13

TREATISES:

13 Moore's Federal Practice ¶817.41 4

OPINIONS BELOW

The opinions below include not only those of the Connecticut Appellate Court and Connecticut Supreme Court noted in the State's Petition, but the opinion of the trial court (unreported), appended hereto. Respondent's App., at 1-16.

———o———

JURISDICTION

The judgment of the Connecticut Supreme Court denying the State's Petition for Certification to Appeal was entered on February 15, 1985. The petitioner's "Affidavit of Timely Filing" declares that its Petition for a Writ of Certiorari was mailed on April 19, 1985. Contrary to the provisions of Rule 20 of the Supreme Court Rules, the State's filing was not made within sixty days after entry of judgment. The case presented is not one where this Court should relax the requirements of Rule 20.3, because this is not a case in which the ends of justice require such an exception.

———o———

STATEMENT OF THE CASE

The respondent, having been charged with possession of a narcotic substance and a controlled substance, filed a motion to suppress materials seized subsequent to a warrantless arrest and search. Following an evidentiary hearing and the submission of briefs, the trial court granted the respondent's motion to suppress and dismissed the

case, finding that the arrest that led to the seizure of the evidence was not supported by probable cause. Respondent's App., at 16.

The petitioner appealed to the Connecticut Appellate Court. The sole issue raised in its appeal was whether or not the trial court erred in its finding that there was no probable cause to justify the seizure and subsequent search of the respondent. Petitioner did not claim a good faith exception to the exclusionary rule, either in the trial court or upon appeal. *State v. Martin*, 2 Conn. App. 605, 606 n.2 (1984), Petitioner's App., at 2A-3A. It should also be noted that the petitioner specifically declined to claim such an exception during oral argument on the appeal, when a member of the appellate tribunal inquired whether that issue was being asserted.

After the Appellate Court affirmed the trial court's decision, the petitioner filed a motion to reargue, setting forth claims of law that it had not raised either in the trial court or on appeal. Its motion was granted in part and, after briefing, the Appellate Court reaffirmed its finding of no error on the appeal and issued a revised opinion. *State v. Martin*, 2 Conn. App. 605 (1984) (revised), Petitioner's App., at 13A-26A.

The good faith exception to the exclusionary rule which the petitioner now seeks to raise in this Court was asserted for the first time in its motion to reargue before the Connecticut Appellate Court, after that court had affirmed the trial court decision. *State v. Martin*, 2 Conn. App. at 612A, Petitioner's App., at 21A. The Connecticut Appellate Court did not pass upon that issue because petitioner failed to assert it, even when invited to do so. The Appellate Court stated:

> This case involves not a search pursuant to a search warrant but a warrantless search, which neither *United States v. Leon*, supra, nor *Massachusetts v. Sheppard*, supra, addresses. Moreover, the state did not claim in the trial court a good faith exception to the exclusionary rule for this warrantless search, as it could have. Cf. *United States v. Leon*, supra. Thus, there was no occasion for the trial court to make such an initial determination. Nor did the state claim such an exception in this court. . . .

Id. at 606-07 n.2, Petitioner's App., at 14A-15A.

Similarly, the petitioner also sought, through its motion to reargue, to raise for the first time the claim that the seizure in this case should have been reviewed by the standard of reasonable and articulable suspicion. The Appellate Court declined to reanalyze the case on the basis of that "belated claim." *State v. Martin*, 2 Conn. App. at 612A, Petitioner's App., at 21A. Among the several cogent reasons given, the court declared:

> Thus, the trial court was not alerted to the opportunity to make additional factual findings which might have been relevant to the claim, and we were thus deprived of those findings and of a reasonable analysis of them by the trial court . . . [W]hether there was, in any given set of circumstances, a reasonable articulable suspicion is in the first instance a question of fact for the trial court [citations omitted]; subject ordinarily to a limited scope of appellate review. [citations omitted]. Thus, it is particularly inappropriate for us to make such a determination after full briefing and argument which ignored that issue.

Id. at 612A-612B, Petitioner's App., at 21A-22A.

REASONS FOR DENYING THE WRIT

A. No Special and Important Reasons for Granting Writ.

For almost sixty years, this Court has adhered to the principle that, as a matter of judicial discretion, a review on writ of certiorari will be granted only when there are "special and important reasons therefor." Sup. Ct.R. 35(5), Revised Rules of the Supreme Court of the United States, adopted June 8, 1925, eff. July 1, 1925, now Sup. Ct.R. 17.1. Petitioner fails to demonstrate any such "special and important reasons" in its brief. Rather, its primary thrust is directed at an invention of its own which it has chosen to call "procedural default." It virtually ignores the *substance* of the trial court and two Appellate Court opinions declaring the seizure and search of the respondent to be illegal.

Petitioner's "procedural default" argument hardly rises to the level of "national importance" which is generally regarded as the cornerstone of any viable certiorari petition. 13 Moore's Federal Practice ¶817.41. Its argument is fraught with contradictions, claiming *inter alia:* that the state appellate courts should have excused and ignored petitioner's failure to identify its presently claimed ground to justify the conduct of the police; that the "ignorance" of the Connecticut State's Attorney who handled the suppression hearing and the oral argument on the appeal should neither "change the law" nor justify a "deliberate departure from it"; and that the Connecticut Appellate Court has "enlarged the scope of the Fourth Amendment" and failed to apply "proper" Fourth Amendment standards. Petition, at 9-11. The petitioner nevertheless concedes that state rules of practice requir-

ing that claims of law be clearly and distinctly raised in the trial court are important and desirable; that a court should not "abandon its judicial role" and assume the role of advocate; and that the "procedural rule" in question may well implicate the principle of appellate law that state court decisions which rest upon independent state grounds are not proper cases for review. Petition, at 14, 16, 17.

The petitioner's admissions of its own procedural failures may present an unusual case, but hardly one of "national importance." Its attack upon its own trial and appeal attorney ("advocates should know the law applicable to a claim" and "their ignorance neither changes the law nor justifies a deliberate departure from it", Petition, at 11), does not serve to make the case more compelling. The petitioner's charge that the Appellate Court enlarged the scope of the Fourth Amendment, on the one hand, and failed to apply its standards, on the other, is a contradiction in terms and unsupported in the record.

The facts of this case make clear that it is far removed from being a case of "national importance". Shorn of its rhetoric, the Petition presents the classic example of an unsuccessful party pursuing a multitude of appeals in the hope of finding a more hospitable forum. This Court has increasingly recognized the need to discourage unsuccessful litigants from pursuing endless appeals, and the present Petition is a paradigm of this regrettable pattern.

The Connecticut Appellate Court did not decide a question of substance that has not been determined by

this Court. It did not decide any issue in a manner that conflicts with a decision of the Connecticut Supreme Court, other state courts of last resort, or of this Court. Nor did it decide "an important question of federal law which has not been, but should be, settled by this Court, or . . . in a way in conflict with applicable decisions of this Court." Sup.Ct.R. 17.1(c).

In order to persuade this Court of the magnitude of the claimed error below, petitioner distorts both fact and law. The petitioner's claim that the Appellate Court "in effect enlarged the scope of the Fourth Amendment," Petition, at 10, is both misleading and incorrect. The Connecticut courts applied the appropriate Fourth Amendment standards to this case, and concluded that there was no probable cause for the seizure of the respondent or the subsequent search. That finding was responsive to the only issue that was raised at trial and on appeal. Petitioner makes a quantum leap from its attack upon the Appellate Court's refusal to consider its untimely theory of the case to the untenable claim that the court enlarged the scope of the Fourth Amendment. No such "enlargement" is discernible from that court's decision.

The petitioner's insistence that the Connecticut courts' findings of no probable cause were based on the subjective intent of the arresting officer is equally misleading and incorrect. The trial court opinion clearly reflects a careful evaluation of both the objective facts of this case and relevant constitutional law. Memorandum of Decision, at 4, 14-18, Respondent's App., at 3-4, 13-16. It did not rely on what the arresting officer said he intended to do, but what the police had done. *Id.* Similarly, the Appellate Court made clear that its decision to affirm was based

on the absence of sufficient "facts and circumstances within the officer's knowledge, and of which he ha[d] trustworthy information sufficient to justify the belief of a reasonable person that an offense ha[d] been or [was] being committed. . . ." *State v. Martin*, 2 Conn. App. at 612B, Petitioner's App. at 22A. It went on to analyze the extensive facts that had been found by the trial court, *id.* at 613-16, Petitioner's App. at 23A-26A, upon which facts it concluded that in this case "the search was based on less than probable cause." *Id.* at 616, Petitioner's App., at 26A. Thus, there is no merit to the petitioner's bald assertion that the finding of no probable cause in this case was founded on the subjective intent of the arresting officer.

The decisions below concerned one of the most ubiquitous issues in criminal law: whether a warrantless arrest and search was justifiable under constitutional principles. The facts presented are comparable to those decided by state and federal trial and appellate courts throughout the country in a myriad of cases. The Connecticut Appellate Court applied the totality of the circumstances test of *Illinois v. Gates,* 462 U.S. 213 (1983), and concluded that the trial court was correct in granting the defendant's motion to suppress. Its decision in this regard was carefully reasoned. It took into account all of the state's claims raised at trial, on appeal, and in its motion for reargument, except for the good-faith exception argument, which, as shown below, does not belong in this case. *See infra* at C.2.

A fair reading of the Petition leaves no doubt that the claims raised do not present new or unique issues, let alone questions of great public importance, but focus

primarily on the state's perception that an individual whom it has prejudged to be guilty has not been convicted. ("[A] criminal will go free. . . ." State's Petition, at 14).

B. Adequate, Independent State Grounds for the Decision Preclude Federal Review.

The respondent fully agrees with petitioner's recognition of the "importance of state rules and procedure, which ordinarily require that claims of law be distinctly raised in the trial court." Petition, at 14. In addition, respondent does not dispute the principle of law cited by petitioner, Petition, at 16n.7, that a party who has defaulted in complying with reasonable state procedural rules for raising a claim is, subject to exceptions not applicable here, barred from federal review of that claim. *Wainwright v. Sykes,* 433 U.S. 72 (1976); *Henry v. Mississippi,* 379 U.S. 433 (1965).

The petitioner's particular default in this case is precisely of the sort that precludes federal review, as there is no question that there is a legitimate state interest in requiring litigants to raise their claims timely. "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as in civil cases by the failure to make timely assertion of the right." *Yakus v. United States,* 321 U.S. 414, 444 (1944). In a criminal case, the state's failure to assert a particular federal claim properly and timely is to be treated no differently than the failure of a defendant

to do so. *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 2323 (1983).

This Court recently had occasion to confirm the principle that "the State's interest in the integrity of its rules and proceedings and the finality of its judgments . . . would be undermined if the federal courts were too free to ignore procedural forfeitures in state court." *Reed v. Ross,* 468 U.S. —, 104 S.Ct. 2901, 2907 (1984). In that case, the question presented was whether Ross's right to relief under *Mullaney v. Wilbur,* 421 U.S. 684 (1975) and *Hankerson v. North Carolina,* 432 U.S. 233 (1977) was forfeited by his attorney's failure, several years before those cases were decided, to claim either at trial or on appeal the unconstitutionality of the jury instruction on the burden of proof.

While Ross's claim arose within the context of federal habeas corpus, its reasoning is no less applicable to a case on direct appeal from the state court. This Court concluded in *Ross* that the failure of counsel to raise a constitutional issue in accordance with applicable state procedures can only be excused on the basis of "novelty" of the issue at the time of the state court proceeding. At the same time, the majority opinion declares:

> Underlying the concept of cause, however, is at least the dual notion that, absent exceptional circumstances, a defendant is bound by the tactical decisions of competent counsel, *Wainwright v. Sykes,*

> 433 U.S., at 91, and n. 14 . . .; *Henry v. Mississippi*, 379 U.S. 443, 451 (1965) . . .; and that defense counsel may not flout state procedures and then turn around and seek refuge in federal court from the consequences of such conduct. *Wainwright v. Sykes, supra*, at 89-90 . . .; *Engle v. Isaac, supra*, at 130. . . . A defense attorney, therefore, may not ignore a State's procedural rule in the expectation that his client's constitutional claim can be raised at a later date in federal court. *Wainwright v. Sykes, supra*, at 89 . . .; *Engle v. Isaac, supra*, at 128-129. . . . (alternate citations omitted).

Reed v. Ross, 104 S.Ct. at 2909.

In this case, the petitioner's belated claims are hardly "novel." When the motion to suppress was heard and briefed, the articulable suspicion rule had long since been adopted by this Court and applied in the Connecticut courts as well. The good-faith issue, even were it applicable, which it is not (*see infra* at C.2), had been raised in this Court, in the *Gates* case. Moreover, the good-faith exception to the exclusionary rule had been adopted en banc by the Fifth Circuit Court of Appeals, as early as 1980. *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980). In fact the good-faith doctrine was a raging issue in the legal community by the time this case was tried and briefed. Thus, unlike the defendant's attorney in *Ross*, the State's attorney in this case asserts no novel constitutional principles. Its procedural defaults, therefore, cannot be excused.

It is well settled that states may determine when federal constitutional issues must first be raised in the state

courts, so long as a litigant is given a fair and reasonable opportunity to raise his claim. "A state procedural rule which forbids the raising of federal questions at late stages in the case, or by other than a prescribed method, has been recognized as a valid exercise of state power." *Williams v. Georgia,* 349 U.S. 375, 382 (1955). For example, in *Herndon v. Georgia,* 295 U.S. 441 (1935), *reh. den.,* 296 U.S. 661, the petitioner had filed a petition for rehearing in the Georgia Supreme Court, in which he attempted to raise a particular federal question for the first time. This Court stated: "The federal question was never properly presented to the state supreme court unless upon motion for the rehearing; and that court then refused to consider it. The long established rule is that the attempt to raise a federal question after judgment, upon a petition for a rehearing, comes too late, unless the court actually entertains the question and decides it." *Id.* at 443. In addition, the belatedly raised issue in *Herndon* involved, as here, a ruling of law that had been made while that case was pending decision. *Herndon* is thus on all fours with this case, and its ruling which barred federal review of a claim raised for the first time in a petition for rehearing, after judgment, requires the same result here.

Moreover, here as in *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317 (1983), the "not pressed or passed upon" rule and the various considerations which underlie it, 103 S.Ct. at 2322-23, militate strongly against this Court's review of an issue that was not properly or timely presented to the Connecticut courts which, accordingly, did not address it. 103 S.Ct. at 2321.

The petitioner concededly defaulted in complying with legitimate state procedural rules[1] for raising the claims it now asks this Court to determine. Under well established principles of federal law, the petitioner is barred from federal review of those claims.

C. Good-Faith Exception Argument Is Untimely and Inapposite.

Petitioner claims that the good-faith exception to the exclusionary rule should be applied to the facts of this case. *See, United States v. Leon,* — U.S. —, 104 S.Ct. 3405 (1984). That clear departure from prior Fourth Amendment law has no place in this case for two reasons: (1) the State not only failed to raise this claim both at trial and on appeal, but expressly waived any such claim during oral argument before the Appellate Court; and (2) the *Leon* rule has no application to the warrantless case here at issue.

1. Untimeliness and Waiver.

The Appellate Court correctly declined to disturb its original decision to consider the *Leon* issue, on the grounds that the State's claim was untimely. *State v. Martin,* 2 Conn. App. 605, 612A (1984), Petitioner's App., at 21A. The court reasoned that, in the first place, the petitioner did not follow the mandate of the Connecticut Practice Book, Sec. 285A, Respondent's App., at 18, which requires that claims of law be distinctly stated to the trial

---

1. The various pertinent state rules with which petitioner failed to comply are set forth in Respondent's App., at 18-21, and discussed, *infra* at C.1.

court, and provides that, where this is not done, "it will not be the duty of either the trial court or the appellate court to decide the claim." *Id.* In the second place, it noted, the State failed to follow the requirements of Secs. 3012 and 3060F of the Connecticut Practice Book, Respondent's App., at 20-21, in that it neither claimed the *Leon* issue in its preliminary statement of issues on the appeal, nor briefed it. *Id.*

Furthermore, Sec. 3063 of the Connecticut Supreme Court Rules, applicable to the Appellate Court by Sec. 2000 of the Rules of the Appellate Court, Respondent's App., at 21, 19, similarly declares:

> The supreme court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. . . .

Finally, in the course of its oral argument before the Appellate Court, the petitioner expressly conceded that it was not claiming the good-faith exception as a basis for reversal. *See, State v. Martin,* 2 Conn. App. at 606-07 n.2, Petitioner's App., at 14A-15A.

Clearly, neither the trial court nor the Appellate Court was obliged, as petitioner suggests, to consider issues of law not called to its attention. To the contrary, for a party to forego arguments and bypass issues only to raise them after an adverse decision subverts generally accepted procedures and rules of trial and appeal, and flies in the face of pertinent case law, fundamental fairness, and public policy. *See,* e.g. *Wainwright v. Sykes,* 433 U.S. at 89-90.

2. The good-faith exception is totally inapplicable to this case.

This is a warrantless arrest and search case. *Leon* simply does not address such a case. The Appellate Court, therefore, correctly chose to ignore the *Leon* issue, and decided the case (twice) on the "current state of constitutional law." *State v. Martin*, 2 Conn. App. at 606-07 n.2, Petitioner's App., at 14A-15A.

There is nothing in the *Leon* decision to suggest that it applies to warrantless searches and/or arrests. Quite the opposite, the majority opinion emphasizes at length the role of the magistrate in the warrant process, stressing that its modification of the Fourth Amendment exclusionary rule rests on its belief that the deterrent aspect of that rule is not compelling in cases involving warrants issued by a "detached and neutral magistrate." *United States v. Leon*, 104 S.Ct. 3405, 3416 (1984). The court points out that:

> Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion thus cannot be expected significantly to deter them.

Id. at 3418.

On the other hand, *Leon* also reaffirms that the exclusionary rule is "designed to deter police misconduct . . .," *id.* at 3418, and does contribute to deterrence of Fourth Amendment violations by penalizing the officers who violate its strictures. *Id.* at 3420.

Clearly, the good-faith doctrine was carefully limited to cases involving warrants, and, therefore, has no

bearing upon a case such as this, where a tip from an anonymous informer led directly to a warrantless arrest.

The petitioner urges this Court both to modify existing constitutional law by expanding the application of the good-faith defense to this non-warrant case, and to overlook petitioner's failure to assert this federal claim as required under Connecticut law. To do so would offend the very considerations that led this Court to employ the "not pressed or passed upon rule" in *Gates,* when it declined to decide the good-faith issue in that case. *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317 (1983). Here, as in that case, the record contains little, if anything, regarding the subjective good faith of the arresting officers. 103 S.Ct. at 2323. Here, as in that case, " 'due regard for the appropriate relationship of this Court to state courts' [citation omitted] demands that those courts be given an opportunity to consider the constitutionality of the action of state officials, and, equally important, proposed changes in existing remedies for unconstitutional actions." *Id.* "Finally, by requiring that the State first argue to the state courts that the federal exclusionary rule should be modified, [this Court] permit[s] a state court, even it agrees with the State as a matter of federal law, to rest its decision on an adequate and independent state ground." *Id.*

Because the application of *Leon* to this case would constitute a substantial departure from existing Fourth Amendment principles, this Court should, as in *Gates,* refuse to pass upon the good-faith defense proposed by

the petitioner, it having failed to raise that claim at an appropriate time in the state court proceedings.

Since, as demonstrated, *Leon* is totally inapposite to the case at bar, it is respondent's position that this Court need not reach the issue of its retroactivity.

Petitioner further claims that "a simple good-faith mistake in the determination of probable cause is a question that would be answered on any remand," and that there is "no need for further trial court findings." (Petition, 23n.9, 24.) As has been stressed in this brief, petitioner never alerted the trial court or opposing counsel to the fact that it was claiming a good-faith exception to the exclusionary rule. No facts were found on this issue. No determination was made. The record is totally inadequate to support any meaningful finding as to the officers' good faith, one way or the other. Thus, a remand to the Connecticut Appellate Court as requested by the petitioner, Petition, at 24, would serve no valid purpose.

D. CONCLUSION

This case is not a case of national importance, and it possesses none of the criteria that militate in favor of the extraordinary relief of certification. The decision of the Connecticut Appellate Court rests on adequate and independent state grounds, thereby precluding federal review of the federal claim that petitioner now seeks to raise. Moreover, those claims were not timely and properly raised, and are not well-founded.

For all of these reasons, the State's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ALAN H. MARTIN
Respondent

By: EMANUEL MARGOLIS
WOFSEY, ROSEN, KWESKIN & KURIANSKY
777 Summer Street
Stamford, CT 06901
(203) 327-2300

Counsel of Record for the Respondent

With whom on the Brief
JUDITH ROSENBERG

Dated: May 16, 1985

No. 84-1659

In the Supreme Court of the United States

October Term, 1984

STATE OF CONNECTICUT,

Petitioner

v.

ALAN H. MARTIN,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

APPENDIX OF THE RESPONDENT

EMANUEL MARGOLIS
(Counsel of Record)
JUDITH ROSENBERG
777 Summer Street
Stamford, CT 06901
(203) 327-2300

Counsel for Respondent

NO. CR3-41149a

STATE OF CONNECTICUT SUPERIOR COURT
V. JUDICIAL DISTRICT OF DANBURY
ALAN MARTIN JUNE 1, 1983

MEMORANDUM OF DECISION

DEFENDANT'S MOTION TO SUPPRESS

The following facts are found by the court:

On August 26, 1981 at approximately 10:30 P.M. Lieutenant Dennis Cooney, the desk officer at Danbury Police Headquarters, answered a phone call and was told by what he believed was a white male that "there is a blue Corvette out-of-state plate that will be going to the Foundry in about twenty (20) minutes to deal in a large amount of cocaine."[1] This caller never identified himself and the voice was unknown to Lieutenant Cooney. In response to this information, Lieutenant Cooney put out a radio call for Detective Merullo to contact him by telephone.

Detective Merullo on this date was a member of the Danbury Police Department for thirteen and one-half (13½) years. He had worked with the Special Investigation Unit of the Danbury Police Department involved in narcotic investigations and was assigned for the past

---

1. The quote from the police report was "Lieutenant Cooney, desk officer, advised Detective Merullo of the Detective Bureau Special Investigation Division that he, Cooney, had just received a phone call from an unknown male who reported that within twenty minutes, a blue Corvette would arrive at the Foundry Cafe on Route 7 and that a large amount of cocaine would be sold from the vehicle."

year to the State Wide Narcotic Task Force. Merullo called Lieutenant Cooney on the telephone located at the rear of police headquarters and was informed of the unidentified caller's message. Along with Detective Hull, he used his own personal vehicle (Gremlin) and proceeded to the Foundry Cafe on Route 7. This trip from headquarters to the Foundry Cafe took approximately five (5) minutes. Upon arriving, Merullo checked the parking lot for a blue Corvette and found none. He parked his vehicle so that he could observe the Foundry and the entrance to the parking lot. Approximately ten (10) minutes later, he observed a blue Corvette enter the parking lot and park under two flood lights attached to the Foundry Cafe building which were located about ten (10) feet from a walkway which was the entrance to the Foundry Cafe and stores which are located on the second floor. The area in which the blue Corvette parked was well illuminated. Detective Merullo telephoned the Danbury Police Department to check ownership and determine if there was any outstanding warrants on the Corvette with New Hampshire plates. He also requested that Lieutenant Cooney contact Sergeant McNamara and Detective Chapman of the Special Investigation Unit.

Merullo observed exiting from the Corvette a fairly tall white blond female from the passenger side. The operator exiting was a tall white male. Both went into the covered walkway and Merullo assumed they were heading for the cafe. Approximately fifteen (15) minutes later, the white male operator exited the covered walkway and was accompanied by another male. Merullo did not recognize the new male as he exited the covered walkway, but did recognize him as he was entering the passenger

side of the blue Corvette as Dominic Cristello. Merullo did not observe anything suspicious about the behavior of either individual at this time. Within a few minutes after the males entered the Corvette, which had tinted windows so that one could not see from the outside into the interior of the car, the vehicle was driven to another area and parked. This area had no illumination and Merullo had to move his vehicle in order to keep it in view.

The operator of the Corvette was unknown to Merullo but he recognized the male passenger as being Dominic Cristello, a person who had been involved in a drug conviction. This knowledge came to him during conversations with fellow police officers who were discussing the Foundry Cafe concerning drug traffic and informed him that Cristello was a frequenter of the Foundry Cafe and had been previously convicted of a drug charge eight (8) years before. He pulled Cristello's file and reviewed it.

Upon Sergeant McNamara's and Detective Chapman's arrival on the scene, Detective Merullo explained everything that had occurred up to the time of their appearance. He informed Sergeant McNamara that he believed he had probable cause to search the Corvette and it was his intention to make a search. It was agreed Sergeant McNamara would also drive his vehicle to the area where the Corvette was parked. Merullo drove his Gremlin up to the Corvette and parked directly behind it. Sergeant McNamara proceeded to go by the Corvette and stopped in front of the Corvette so that in effect the vehicle was boxed in. Merullo immediately exited his vehicle and proceeded to the Corvette to proceed with the search

believing he had probable cause to do so. He approached the driver's side of the Corvette badge in hand and identified himself as a police officer. He then requested the car's window be rolled down and it was rolled down partially. He then asked the operator for his license and registration. For his own protection, because he could not see the inside of the vehicle due to the tinted glass, he pulled open the vehicle door. Upon doing so the interior light was put on. Merullo stood by the car door and observed the operator trying to find his registration. It was at this point Merullo observed a small amber bottle with a small spoon on the top in the operator's hand being laid on the floor between his legs. It was Merullo's knowledge that it was common practice to carry cocaine in such a vessel and use the spoon for snorting. At this point, Merullo advised the operator he was under arrest and then after a period of five (5) minutes the officers searched the vehicle. Discovered in the back of the vehicle was an overnight bag and a paper bag. The paper bag contained a plastic bag with cocaine. The brown bag contained U.S. currency.

The defendant in his motion to suppress raises the following claims of law:

1. The tip that gave rise to the seizure of the defendant was patently unreliable and must therefore be treated as though it never occurred.

2. The defendant was "seized" within the meaning of the Fourth Amendment when the detectives approached his car.

3. The seizure of the defendant was patently unlawful.

4. The arrest of the defendant was made without probable cause.

As to the first claim of law, the defendant argues that because the tip that gave rise to the seizure of the defendant was from an anonymous informer, it must be carefully scrutinized and its degree of reliability ascertained. The informer being anonymous could not infer any reliability to the tip. The content of the tip was limited to the following: "There is a blue Corvette out-of-state plate, that will be going to the Foundry in about twenty minutes to deal in a large amount of cocaine."

The defendant argues that the informer did not identify the car by plate number, year, condition or shade of blue; did not identify the name of the owner or driver; or even indicate if a woman or a man old or young would be driving the car. He did not indicate if there would be a passenger in the car or where the sale of cocaine would take place. Nor did the informer give a single fact establishing the source of his information or indicating that he spoke from personal knowledge.

The defendant further argues that the guidelines for determining the reliability information received from an unidentified informant from *Spinelli v. United States,* 393 U.S. 410, 89 S. Ct. 584 (1969), which implements *Aguilar v. Texas,* 378 U.S. 108, 84 S. Ct. 1509 (1964). *Aguilar* teaches that the reliability of information received from an unidentified informant must be tested against facts demonstrating both (1) the informants' basis of knowledge and (2) that the informant is credible. *Aguilar,* supra, 114. Under *Spinelli,* it is permissible to add cor-

roboration to the probable cause assessment. *Spinelli,* supra, 415-417. *Spinelli* cautions, however, that "the tip even when certain parts of it have been corroborated by independent sources, (must be) as trustworthy as a tip which would pass *Aguilar's* test without independent corroboration." *Spinelli,* supra, 415. Although *Aguilar* and *Spinelli* were warrant cases, their standards are applicable to non-warrant cases. See, e.g., *State v. Penland,* 174 Conn. 153 (1978); *United States v. Smith,* 598 F. 2d 936 (5th Circuit 1979). *Cf. Spinelli,* supra, 416 n. 5. Indeed, a greater measure of reliability is necessary where the police have acted without a warrant. As stated in *Aguilar:*

> "'(T)he informed and deliberate determinations of magistrates empowered to issue warrants . . . are to be preferred over the hurried action of officers . . . who may happen to make arrests.' *United States v. Lefkowitz,* 285 U.S. 452, 464 . . . the reviewing courts will accept evidence of a less 'judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant.' "

In the instant case the defendant argues that it meets neither of the *Aguilar* requirements. The informer gave no circumstances on which he based his tip, and, since he did not identify himself, the police could draw no conclusions as to his credibility.

A tip from an unknown informant is presumptively unreliable. As the informer is not known personally, it cannot be shown that he has provided reliable information in the past; see e.g., *Draper v. United States,* 358 U.S. 307, 79 S. Ct. 329 (1959); he cannot be said to be making a declaration against penal interests; see e.g., *State v. Ferguson,* — Conn. —, 43 Conn. L.J. No. 4, page 21; nor

is he available and therefore subject to arrest for false complaint. *Adams v. Williams,* 407 U.S. 143 (1972). *Cf. Jones v. United States,* 362 U.S. 257 (1960); *People v. Taggart,* 20 N.Y. 2d 335, 283 N.Y.S. 2d 1 (1967). Using anonymous information as a basis for intrusion police action is highly dangerous and such action should not be undertaken for the enforcement of sumptuary laws, such as gambling and the laws of limited public conveniences, such as narcotic violations. *Commonwealth v. Cruse,* 236 Pa. Super. 85, 344 A.2d 532, 535 (1975). (A tip from an anonymous source that persons in a certain car were armed and about to sell drugs "was completely lacking any indicia of reliability.")

If the tip in this case had no indicia of reliability for purposes of the credibility prong of *Aguilar,* it could pass the *Aguilar-Spinelli* requirements only if it contained extensive detail of the source of the informant's knowledge and was significantly corroborated. "Where the informer remains anonymous and as a result law enforcement officials have no idea whether he is credible there must be a strong showing of underlying circumstances that reveal the informer's source and significant corroboration of the tip." *United States v. Smith,* supra, 940.

For the type and amount of detail needed to satisfy the *Aguilar* basis of knowledge tests, Spinelli points to *Draper v. United States,* supra, as a "suitable benchmark." *Spinelli,* supra, 416-17. The tip that was found reliable in *Draper* had come from a paid "special employee" who not only was known, but also had a history of providing information that "had always been found accurate and reliable. . . ." *Draper,* supra, 313. Yet the court carefully assessed the content of the tip, finding that it was

reliable because it contained extensive detail. There, the tip included the exact physical attributes of the suspect (height, weight, age, race, complexion), the precise clothing he would be wearing and the suspect's immediate prior whereabouts. *Draper,* supra, 313.

The defendant argues that when compared to the detail of the information provided there *by a reliable informer,* the bare details in the tip herein are glaringly insufficient. Absolutely no facts were provided which indicated the source of the informant's information or from which it could reasonably be inferred that the informer spoke from personal knowledge. Indeed, absolutely no facts were provided concerning the suspect, not even the gender, let alone the detailed description would be proper under a *Spinelli-Draper* assessment. The tip in this case contained no "indicia of reliability," with regard to either prong of the *Aguilar* test. Here, as in *Aguilar,* there is no more than the " 'mere conclusion' that the defendant (possessed narcotics). . . . For all that appears the source merely suspected, believed or concluded that there was narcotics in the (defendant's) possession." *Aguilar,* supra, 113-114.

The standard to be used in determining whether a tip contains adequate detail to infer direct knowledge on the part of an informant "must be a stringent one, for only by adhering to the essential demands of the *Aguilar* tests can we avoid eviscerating the Fourth Amendment requirements of probable cause." *United States v. Bush,* 647 F. 2d 357, 364 (3rd Cir. 1981). This tip the defendant claims clearly fails that test. Further, the defendant claims it is precisely the type of tip referred to in *Adams*

v. Williams, supra, 147, where the court (Rehnquist, J.) said: "Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forceable stop of a suspect would be authorized." The defendant argues that this is clearly a tip so lacking in reliability that it can provide no legality to the seizure of the defendant.

Nor, the defendant claims, can it be maintained that this totally unreliable report received validation by corroboration. "Certainly, more than the corroboration of a few minor elements of the story is necessary (to demonstrate the informer's voracity), especially if those elements involve non-suspect behavior." *United States v. Bush,* supra, 363. "(C)orroboration is the word of innocent details of a tip is insufficient to establish a reasonable suspicion, much less probable cause." *United States v. Rasor,* 599 F. 2d 1330, 1332 (5th Cir. 1979).

The State admits, as it must, that a tip from an anonymous phone caller does not meet the two pronged test of credibility and reliability required for an arrest or search warrant under the *Aguilar* standard. *Aguilar v. Texas,* supra. The State argues that even with an anonymous tip the Court should analyze "the weight of the tip in a situation where the tip clearly was not up to *Aguilar* standards. *Draper v. United States,* supra; *Spinelli v. United States,* supra. The State argues that these cases suggest that strong factual corroboration could cure *Aguilar* deficiencies. The factual corroboration was the appearance of a blue Corvette within the twenty (20) minute span at the Foundry Cafe with out-of-state license plates. All of these facts the State admits were "inno-

cent-seeming" but when Merullo observed Cristello enter the car, the car being moved to a dark area, it claims that Merullo having knowledge of Cristello from a fellow police officer as having been convicted of a drug charge, and that he had been informed that Cristello hung around the Foundry—this now gave him corroboration of the key fact that drugs would be sold from the car. At this point the State argues that Merullo had a particularized, reasonable basis for approaching the car. The State then suggests that Merullo's purpose in approaching the car was "to further investigate," to determine the operator's identity and that he opened the car door out of concern for his personal safety.

The Court has already found as a fact that Merullo informed his sergeant that he had probable cause to search the defendant's vehicle and the move by the cars to block the Corvette is corroboration of this intent. Merullo testified that it was not his intention to make an arrest, only to search the car.

The State contends that even if Merullo's intent was to conduct a search, as opposed to making an investigatory stop, his actions were reasonable and based upon probable cause arising from the facts he observed.

> "A greater showing of the reliability of an informant's statement is necessary to support probable cause for a search than is needed to support the reasonable, or founded, suspicion which is a prerequisite for a valid stop. Compare *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed. 2d 637 (1969), and *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) (probable cause for search), with *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975), *Adams*

> *v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed. 2d 612 (1972), and *United States v. Avalos-Ochoa*, 557 F. 2d 1299 (9th Cir.), cert. denied, 434 U.S. 974, 98 S.Ct. 532, 54 L.Ed. 2d 466 (1977) (founded suspicion for stop). Although it is not certain how much less demanding the test of reliability is where only reasonable suspicion is required, the Supreme Court has said that "(s)ome tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized." *Adams v. Williams*, 407 U.S. at 147, 92 S.Ct. at 1924." *United States v. Sierra-Hernandez*, 581 F II 760 (1978).

Indeed, a *greater* measure of reliability is necessary where the police have acted without a warrant. As stated in *Aguilar:*

> " '(T)he informed and deliberate determinations of magistrates empowered to issue warrants . . . are to be preferred over the hurried action of officers . . . who may happen to make arrests.' *United States v. Lefkowitz*, 285 U.S. 452, 464 . . . the reviewing courts will accept evidence of a less 'judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant'. . . . "

Aguilar, supra, at 110-11.

Certainly more than the corroboration of a few minor elements of the story is necessary (to demonstrate the informer's veracity), especially if those elements involve non-suspect behavior." *United States v. Bush*, supra, 363. (C)orroboration of innocent details of a tip is insufficient to establish reasonable suspicion, much less probable cause." *United States v. Rasor*, supra, 1332.

The Rasor case is notable, in that its facts are quite similar to the instant case. There, the anonymous caller told an immigration inspector that a certain vehicle contained an unknown quantity of marijuana. The informer gave the license number and exact location of the vehicle. The police conducted a further investigation and ascertained the name of the owner, the fact that he had previously been arrested for heroin possession, and that he used the vehicle to travel between Chicago and the Mexican/Texas border. They also observed, precisely as in the case at bar, the defendant move the vehicle from one parking space to another. Despite the greater detail given by the informer, and despite the incriminating information subsequently learned about him, the court held that there was no probable cause for the issuance of a warrant; there was nothing suspicious in the defendant's behavior in moving his vehicle and not even the subsequently acquired knowledge plus "the bald assertion of the anonymous informant could warrant a person of reasonable caution in the belief that the vehicle contained marijuana." *Id.*

In this case, the defendant argues there was no such corroboration or indicia of responsibility as required to make the seizure of the defendant legal. See, e.g., *Whiteley v. Warden, Wyoming State Penitentiary*, 401 U.S. 560 (1971). The tip from the anonymous informer in *Whitely* contained not only a more detailed description of the vehicle, including year, shade of color, and partial license number, but also the names and detailed physical descriptions of the occupants. Even with the extensively greater detail of that tip, the court held that the stop of the vehicle and the ensuing arrest and search were un-

reasonable, explaining that the "very most the additional information tended to establish" was that the informant had accurately described the vehicle and its occupants, but that such corroboration would not "support either the reliability of the informant or the informant's conclusion that those men were connected with crime." *Id.* 567. Clearly, the defendant claims the action of the police in this case has greatly less validity than that found invalid in *Whiteley.*

The defendant notes that the State of Connecticut relies heavily on the decision in *Adams v. Williams,* supra. In *Adams* an investigatory stop was upheld where an informer was personally known to the investigating officer, was subject to arrest for making a false complaint and had provided reliable information in the past; the court noted with particularity that "this is a stronger case than obtains in the case of an anonymous telephone tip." 407 U.S. 146. Thus, the *Adams* case lends support to the defendant's position that the seizure of his person and the search of his vehicle were unconstitutional.

The next issue presented is whether the defendant was "seized" within the meaning of the Fourth Amendment.

A person is "seized" within the meaning of the Fourth Amendment, only when, by means of a show of authority or the exercise of physical force, his freedom or liberty of movement is restrained to a degree that a reasonable individual, in view of all the surrounding circumstances, would conclude that he is not free to leave, or to disregard any questions put to him. *United States v. Mendenhall,* 446 U.S. 544, 553-54 (1980) (plurality opin-

ion); *State v. Ostroski,* 186 Conn. 287, 291-92 (1982). Ultimately, the determination of whether there has been such a seizure is an issue of fact. *State v. Ostroski,* supra, 292.

In the instant case, the defendant was seized when the police "boxed in" his car with theirs. Clearly, he was not free to leave. The police intended to search his car. With the Corvette in a stationary position between two unmarked police vehicles, four officers approached the defendant, pretextually, asked for his license and registration. As expressed in *United States v. PenaCantu,* 639 F.2d 1228 (5th Cir. 1981), "a reasonable driver would not feel free to ignore a situation in which several agents pull up directly behind his stationary car, position themselves on both the driver and passenger sides of the vehicle, and proceed to question him." *Id.* at 1229. See also *United States v. Beck,* 602 F.2d 726, 728 (5th Cir. 1979) (when police "interrupted their patrol by pulling alongside the parked Chevrolet, they clearly took the sort of action contemplated by Terry.").

In this case, the record is devoid of any information indicating that the police suspected an irregularity in the defendant's license or registration. Thus, the seizure effected when the detectives approached the defendant's car was unreasonable unless the police, as the State contends, had probable cause to conduct a search within the meaning of the Fourth Amendment.

In the absence of certain recognized and well-delineated exceptions, the Fourth Amendment requires that a search and seizure conducted in an area where the individual has a justifiable expectation of privacy, must be

both reasonable and conducted under authority of a valid warrant. See *State v. Johnson,* — Conn. —, 42 Conn. L.J. No. 35, pp. 1, 3 (February 24, 1981); *State v. Kolinsky,* — Conn. —, 42 Conn. L.J. No. 26, pp. 6, 8 (December 23, 1980), *cert. denied,* 451 U.S. 973 (1981); *State v. DeChamplain,* 179 Conn. 522, 527 (1980); *State v. Federici,* 179 Conn. 46, 51-52 (1979). Otherwise, they will be condemned as unreasonable. *State v. Januszewski,* 182 Conn. 142, 151-52 (1980), *cert. denied,* 101 S.Ct. 3159 (1981).

In determining the reasonableness of police conduct under the Fourth Amendment, the courts will balance the need to search or seize against the invasion resulting from such activity. The test to be applied, which is objective in nature, is whether the facts available to the officer at the moment of the search or seizure warrant a man of reasonable prudence and caution to believe that the action taken was appropriate. Thus, to justify a particular intrusion, the police must be able to demonstrate specific and articulable fact which, taken together with rational inferences from those facts, reasonably warrant the action taken. *State v. Januszewski,* supra, 148-49, *cert. denied,* 101 S.Ct. 3159 (1981).

The defendant in this case was seized when the police officers drove up, surrounded him with their cars. The seizure was valid only if made with probable cause. *State v. Federici,* 179 Conn. 46, 55 n.5 (1979).

Probable cause exists only when "the facts and circumstances within the knowledge of the officer and of which he has *reasonably trustworthy* information are sufficient in themselves to warrant a man of reasonable caution to believe that a felony has been committed," *State*

v. Wilson, 178 Conn. 427, 436 (1979) (emphasis added), and that the person seized committed it. *State v. DeChamplain,* supra, 529. "Probable cause means more than a mere suspicion." *State v. Penland,* supra, 155.

In *State v. DeChamplain,* supra, Justice Speziale, now our Chief Justice, noted in a footnote at page 529 that, "Although the precise determinations differ when probable cause to *search and seize* is at issue as opposed to probable cause to *arrest* '(i)t is generally assumed by the Supreme Court and the lower courts that the same quantum of evidence is required whether one is concerned with probable cause to arrest or probable cause to search.' 1 La Fave, Search & Seizure: A treatise on the Fourth Amendment (1978) Sec. 3.1(b), p. 441; see *Chambers v. Maroney,* 399 U.S. 42, 47, 90 S.Ct. 1975, . . . (1970); *Ker v. California,* 374 U.S. 23, 41-43, 83 S.Ct. 1623 . . . (1963); *Johnson v. United States,* 333 U.S. 10, 15, 68 S.Ct. 367 . . . (1948). *State v. Federici,* 179 Conn. 46, 55 n. 5, . . . (1979)."

The court finds that:

1. The tip from the unnamed informer was patently unreliable and therefore is to be treated as if it never existed.

2. The defendant was "seized" within the meaning of the Fourth Amendment to the Constitution when the detectives boxed his car and approached him.

3. This seizure of the defendant was unlawful.

4. The arrest of the defendant was made without probable cause.

The Motion to Suppress is granted.

/s/ McGrath, J.

STATE OF CONNECTICUT
SUPERIOR COURT

Judicial District of Danbury

No. CR 3-41149a

STATE OF CONNECTICUT

vs.

ALAN MARTIN

I, Therese A. Servas, Clerk of the Superior Court for the Judicial District of Danbury, hereby certify that the within and foregoing is a true copy of the original MEMORANDUM OF DECISION DEFENDANT'S MOTION TO SUPPRESS DATED JUNE 1, 1983, in said cause, as on file and of record appears.

In witness whereof, I have hereunto set my hand and the Seal of said Court at Danbury in said Judicial District, this 28th day of OCTOBER, 1983.

Therese A. Servas, Clerk

Connecticut Practice Book, Sec. 285A. Trial Briefs; Claims of Law

The parties may, as of right, or shall, if the court so orders, file, at such time as the court shall determine, written trial briefs discussing the issues in the case and the factual or legal basis upon which they ought to be resolved.

If a party intends to raise any claim of law which may be the subject of an appeal, he must either state the same distinctly to the court before his argument is closed or state it in a written trial brief. If this is not done, it will not be the duty of either the trial court or the appellate court to decide the claim.

Connecticut Practice Book, Sec. 2000. Applicable Sections of Supreme Court Rules

The practice and procedure for appeals to the appellate court shall conform to the rules of practice governing appeals to the supreme court except where a particular practice or procedure is specified by the rules of the appellate court. With the exception of printed briefs and records, all forms and filings specified for use in appeals to the supreme court shall be used in all appeals to the appellate court.

Appeals from any final judgment of a trial court which by statute may be taken to the appellate court only by certification by that court upon petition by an aggrieved party shall conform to the supreme court rules concerning appeals by certification, so far as they are applicable, except where a particular practice or procedure is specified by the rules of the appellate court.

Connecticut Practice Book, Sec. 3012. Papers To Be Filed [By Appellant and Appellee] on Issues, Record and Transcript

The appellant shall send, as set forth in Sec. 3013, to the chief clerk of the supreme court at the same time the appellant sends him a copy of the appeal:

(a) A preliminary statement of the issues intended for presentation on appeal. If the appellee wishes to present for review alternate grounds upon which the judgment may be affirmed, or if he wishes to present for review adverse rulings or decisions of the court which should be considered on appeal in the event the appellant is awarded a new trial, [or if he wishes to claim that a new trial rather than a directed judgment should be ordered if appellant is successful on the appeal,] he may file a preliminary statement of issues within fourteen days from the filing of the appeal.

* * *

Note: Bracketed portions became effective on January 1, 1985 and have no bearing on this case.

Connecticut Practice Book, Sec. 3060F. (Formerly Sec. 3054). Appellant's Brief; Form

The appellant's brief shall contain the following:

(a) A concise statement setting forth, in separately numbered paragraphs, without detail or discussion, the principal issue or issues involved in the appeal, the appropriate references to the page or pages of the brief where the issue is discussed, pursuant to subsection (d) hereof. . . . The court may refuse to receive a brief not complying with this requirement.

* * *

Connecticut Practice Book, Sec. 3063. Errors Considered

The supreme court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. The supreme court may in the interests of justice notice plain error not brought to the attention of the trial court.